

# Public Administration and the Modern State

## Administration and Impact

Edited by  
Eberhard Bohne, John D. Graham  
Jos C. N. Raadschelders with Jesse Paul Lehrke

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## Assessing Trends and Impact

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# Introduction

*Eberhard Bohne, John D. Graham, and Jos C. N. Raadschelders*

The modern public administrator in both the developed and the developing world is facing unprecedented yet similar challenges. They include the globalization of markets, economic and financial crises, the polarization of politics, rapid advances in the technology of communication, a rapid decline of the width of social time (in other words, the time it takes to communicate a message from one person to another), substantial mistrust of the public sector, rising (income) inequalities, a burgeoning nonprofit sector and civil society, new forms of crime and terror, unsustainable rates of resource consumption, global environmental concerns, and rising tensions in multiethnic and multicultural societies. The problems that governments have been expected to address have never been simple, but it appears that many contemporary problems transcend the capacity of government, even when assisted by nonprofit and private actors. They are ‘wicked problems’ (Rittel and Webber, 1973) that, at best, can be “resolved” rather than solved.

Given the scarcity of resources and the growing interdependence of territorial states, the sensible response has been for governments to network and collaborate. Accordingly, public administration literature on network theory and collaborative government has grown rapidly in the past ten years (see, for example, Donahue and Zeckhauser, 2011; Agranoff, 2012). However, that literature focuses on government’s day-to-day operations, whereas we seek herein to bring the state (and government) back into the study of public administration. The purpose of this book is to examine how trends in the modern state influence the normative foundations, functions, structures, and processes of public administration.

Most scholarly studies about the (territorial, national) state are situated in political science, sociology, or anthropology and focus on the

nature and/or the origins of the state. Political scientists initially developed various (system) theories of the state that were grounded in the structural-functionalist framework of the sociologist Talcott Parsons (for an overview, see Chilcote, 1994). In recent decades neo-institutional theory within political science has brought attention back to administrative history (see, for example, Heady, 2001), to world systems theory (Wallerstein, 1979; Chase-Dunn and Hall, 1997), to trajectories of state development (Chase-Dunn and Anderson, 2005), and to questions about the role and position of the state in the modern world as expressed in such concepts as the *active state*, the *hollow state*, the *enabling state*, and *government* and/or *governance*. We develop such themes in detail in the following.

In the following section we discuss perceptions and concepts of the state and their influence on key characteristics of public administration. While it is true that the state is a territorially circumscribed jurisdiction everywhere, how it is perceived and conceptualized can vary with societal culture. Hence we cannot really understand public administration without understanding the state. The subsequent section is devoted to outlining why and how the traditional focus of state concepts on aspects of state authority is gradually shifting to characteristics of the institutional order of the state. This shift is in turn influencing the normative foundations, functions, structures, and processes of public administration. The last section provides a substantive outline of the plan of the book.

## Perspectives on and perceptions and concepts of the state

In the study of public administration, attention to the state is conspicuously absent, despite the fact that it is the territorial and jurisdictional foundation of government. A state is defined as a polity characterized by

- (a) control over a well-defined, usually continuous territory;
- (b) a relatively centralized administration;
- (c) differentiation from other societal associations through the development of permanent and society-overarching institutions; and
- (d) a monopoly over the legitimate use of coercion, assuring that it could pass justice in the name of all (state authority) (Tilly, 1975, p. 27; Dyson, 1980).

This definition identifies the state as a (ad a) territorial, (ad b) top-down, (ad c) autonomous, and (ad d) sovereign entity in which ultimate legal

authority is invested. It is also a definition that was confirmed in the 1933 Montevideo Conference of Rights and Duties of States and which thus dominates international law. In this juridical and Weberian sense, the state is unchanging, its position clearly defined in relation to other states. Yet from a sociological perspective, one that emphasizes much more the domestic side in which the state manifests itself, the state is ever changing and it does so in relation to changes in the, for example, social, economic, political, and cultural environments. A sociological perspective allows us to position the state in the past and the present, and perhaps even in the future.

One of the very few public administration scholars who has carefully considered how the state is perceived in a given society and how that perception influences government and public administration is Richard Stillman. He distinguished four types of state. Table I.1 displays these and similar conceptualizations of the state and their influence on the key characteristics of public administration.

In the *no-state*, government and public administration are minimal, limited to the traditional roles of maintaining public order and safety and defending the territory against outside aggressors (cf., the night-watch state). With regard to the United States, it was popular for a while to refer to its stateless origins since '[...] the establishment of democratic political institutions preceded the establishment of administrative ones' (Nelson, 1982, p. 775; see also Nettl, 1968, p. 561), but Novak (2008) has convincingly shown that such an image of early America is a "myth." A similar concept, which emerged in the 1980s and 1990s, is the *hollow state*. Its main characteristic is to outsource public services to private actors (for example, nonprofit organizations) and to replace public administrative structures with arrangements of private networks (Milward and Provan, 2000).

In contrast, the *bold* or *active state* favors an activist government and public administration, exemplified by what is commonly known as the *welfare state*. The state provides security to its people, both against foreign aggression, for which there is the military, and against internal dangers, for which there are, for instance, police and fire departments, the FBI (Federal Bureau of Investigation) in the United States, the BKA (*Bundes Kriminal Amt*; Federal Criminal Police Office) in Germany, and the NCA (National Crime Agency) in the United Kingdom as well as government departments such as the relatively recent addition of a homeland security department in the United States. Additionally, citizens can expect the provision of medical and health care, education, and navigable physical infrastructures (roads, railways, and harbors),

Table I.1 State concepts and their consequences for public administration's role

State concepts	Main characteristics of state	Consequences for role of public administration in societies
No-State <sup>a</sup> / Hollow State <sup>b</sup>	Minimal state intervention in society; role limited to maintaining public order and safety	Sharply limited; outsourcing of public services to private actors
Bold State <sup>a</sup> / Active State <sup>c</sup>	Broad state intervention in society; welfare state	Broadly expanded bureaucracy providing all public services to society; establishing planning systems
Pre-State <sup>a</sup>	Evolutionary state concept between minimal state and interventionist state	Satisficing rather than optimizing decision making
Pro-State <sup>a</sup>	State as a professional technocracy by experts	Global, encompassing role of public administration with blurred boundaries between public and private sectors
Enabling State <sup>d</sup>	Empowering citizens to take joint responsibility with the state for their own well-being	Public administration is limited to the role of helping citizens to help themselves; customer orientation in new public management
Ensuring State <sup>e</sup>	State obligation to guarantee the delivery of public services if private service providers fail	Reserve competence of public administration for delivering all public services; regulating rather than providing these services

<sup>a</sup>Stillman (1999, p. 183).<sup>b</sup>Milward and Provan (2000, p. 359).<sup>c</sup>Jann and Wegrich (2004, p. 193).<sup>d</sup>HM Government (2007).<sup>e</sup>Schuppert (2003, p. 54).

Source: Partially adapted from Stillman (1999, p. 226).

and so forth. Planning systems are the preferred instruments of the active state, and optimizing administrative decisions is the rationality concept of public administration (Jann and Wegrich, 2004, p. 193). The term active state emphasizes the interventionist character of the broad spectrum of the government's traditional (order and safety) and welfare services.

The concept of the active or welfare state has been contrasted with the more recent concepts of the enabling state and the ensuring state. Welfare programs are labor intensive and so it is that in the course of the 1980s the notion of an enabling state emerged as part of the effort to legitimize the reduction of state intervention through cutbacks in welfare programs. The notion of an ensuring state surfaced in the 1990s. These concepts of the enabling state and the ensuring state prevail in the contemporary European state discussion.

The concept of the *enabling state* has been primarily pursued in the United Kingdom as a reaction to neoliberal models of a minimal state (Giddens, 2003, p. 13; HM Government, 2007; Page and Wright, 2007, pp. 3–5; Elvidge, 2013). The basic idea of the enabling state is citizen empowerment. Thus, the main function of public administration is to provide citizens with enough resources to develop their own lives. The notion of customer orientation in the concept of new public management is rooted in the idea of the enabling state. In structural terms, the enabling state and the active state concepts are based on the separation of politics and public administration. The notion of independent regulatory agencies that regulate the markets “at arm’s length” and the market orientation of the new public management concept, both of which became popular in the 1980s and 1990s, also reflect this politics-administration dichotomy.

The concept of the *ensuring state* was primarily developed in Germany, where it falls under the term *Gewährleistungsstaat*. It builds on the notion from the enabling state concept that there is a joint responsibility of the state and citizens for the well-being of society (Giddens, 2003, p. 13). However, unlike the enabling state, the ensuring state has to assure that public services are provided and public interests are met where and when private actors fail. Thus, there is a state responsibility for the well-being of citizens ‘after enabling’ (Schuppert, 2003, p. 57). Consequently, public administration is regulating the provisions of public services by private actors rather than fulfilling public tasks with its own means (Giddens, 2003, p. 13). In contrast to the active and the enabling state the politics-administration dichotomy is not a constitutive structural principle of the ensuring state but is conceived of as a situational element of the state. This is to say that a government act, such as a development consent for an infrastructure project, can be purely administrative in one context and highly political in another when it affects the political power structure. A case in point is the development consent for the new Stuttgart main railway station which shifted the power balance in the State of Baden-Württemberg, Germany, in favor of

the left-leaning Green Party for the first time ever in this traditionally right-leaning State.

The *pro-state* conception emphasizes that government has become global, driven by techniques used by professionals and specialists. Public administration has an encompassing role with blurred boundaries between private and public sectors. This professional state is run by experts and is therefore the most undemocratic of the four types Stillman distinguishes.

As can be expected, states are not static; they change from being weak to being strong, from collapsed to failed, and so on (Hanlon, 2011). The middle ground between these two extremes of no-state/hollow state and bold/active state falls under the idea of the *pre-state*. This concept addresses the organic, evolutionary development of the state and its supporters are not as definite about the proper role of such a state. They point to the importance of, as Price called it (1983, p. 9), the ‘unwritten constitution’, which includes basic but often implicit political-philosophical ideas and the prejudices and attitudes of the people. More than in other states, decision making in public administration of the pre-state follows the principle of satisficing rather than optimizing (Simon, 1997).

## From state authority to institutional order of the state

The state concepts in Table I.1 have one characteristic in common: they focus on aspects of state authority, which is an element of the aforementioned definition of a state. State authority describes the ability of the state to act and is based on the concept of sovereignty, which attributes the monopoly of the legitimate use of physical coercion to the state. The bold/active state has wide authority to intervene in society. The pre-state/hollow state concepts regard state authority as limited and emphasize the priority of markets and private actors. In a similar vein, the concept of the enabling state restricts state authority to maintaining public order and safety and to providing citizens with the resources to help themselves. The concept of the ensuring state expands again state authority but not to the same extent as in the bold/active state concept.

While these different scopes of state authority have some relevance for the development of the state and public administration, the focus on the concept of state authority neglects the fact that the state and public administration represent an institutional order that emerged through a long historical process (Benz, 2012, p. 226). The institutional order is a prerequisite for effective and efficient governance and the restriction of

potentially arbitrary political power. It seems that the changing nature of contemporary problems that states have to cope with is bringing about changes in essential characteristics of the institutional order of states and public administration. It is thus only against the historical background that we can come to understand the momentous nature of the changes that are now unfolding

The foundations for the contemporary state and public administration were laid in the late eighteenth and early nineteenth century through several major innovations in the institutional superstructure which we can situate at three levels of analysis (see Kiser and Ostrom, 1982). At the constitutional level, that of the institutional superstructure, there are at least five major changes: people changed (though not overnight) from being mere subjects to participating citizens; distinct public and private sectors emerged; church and state separated, however uneasily; constitutions were created, though not always in written form (for example, in the UK); and politics was separated from administration, at least to some extent.

The rise of the specialized public administrator has, in turn, had profound consequences at the organizational and individual levels. At the organizational level of government, departmentalization became widespread. While there had been government departments before this time (Raadschelders, 2002, p. 12), the notion to structure the bulk of the public sector in clearly identifiable units that were organized as a bureaucracy (with unity of command, clear line structure, and so on) that was subjected to the primacy of politics is yet another product of the eighteenth century. Collegial organization in which one office was held by a group of people – the normal situation at middle and higher managerial levels (for instance, the regents of the orphanage) – was from here on limited to elective office (for example, legislative bodies) and sometimes also to judicial office (for example, High Court). A related development was to separate office from officeholder. Throughout history it had been quite common to acquire a position on the basis of kinship or friendship; offices could be inherited, even sold. Urged by Popes Celestine I and Leo I (fifth century) (Miller, 1983, p. 84), and later reiterated by Martin Luther (Hattenhauer, 1978, p. 15), the separation of office and officeholder was not common practice until the late eighteenth or early nineteenth century.

Such developments also had consequences at the level of individual officeholders. The separation of politics and administration happened with an eye on two important issues: to make administrators less dependent on their “political bosses” yet subordinate to the latter

and not beholden to other external influences, and to increase their substantive qualifications for holding a career civil service position. Previously, government jobs below the top ranks often required one to two days a week at most. Except for the elites, anyone working in a government job had to augment their income by employment elsewhere. Since salary was paid in money *and* in kind, and since there was no formal pension system, those working in a government job were highly dependent on patronage. The fact that they worked other jobs as well opened the door for conflict of interest and corruption. It was only in the early nineteenth century that administrative positions in government became full-time jobs, compensated with a salary in money that was sufficient to sustain a family. Equally important, government employees were no longer required to work until very old age due to the establishment of a pension system (Wunder, 2000). To have a sufficient salary and pension in money was one of the features of Max Weber's ideal typical bureaucracy: at one stroke career civil servants became somewhat autonomous from political officeholders and were no longer beholden to other employers. In return, career civil servants were expected to serve the elected administration to the best of their ability, which included gaining appropriate educational background and experience.

Taking a long historical perspective makes it clear that the structure and functioning of the contemporary state and its government is very different from its historical predecessor. In terms of institutional superstructure, little has changed in the past 200+ years. That is to say, if anything, it is that democracy is becoming the dominant political system, with the remarkable exception of some accomplished Asian societies. What has changed is that the functions of government have grown, especially since the late nineteenth century, due to the changing nature of problems which states are facing. All Western and democratic governments have become strong states providing a wide range of services and policies.

Yet the state has changed beyond just a mere quantitative increase in the functions of government. If this were the case then public administration would not be at a "crossroads," as the purely quantitative increase in tasks could be addressed by simply scaling up and expanding public administration. Despite the expansion of the state, wicked problems can only be resolved for the time being and governments will always find these types of problems difficult to address. This is because in the process of state development outlined earlier the world has evolved into a globalized and interdependent system. As the system



evolved, the state responded with changes in its public administration, and indeed in loosening its control over the very features which define the state in the hopes of being more flexible and innovative. Direct control of territory became less relevant, authority was diluted, and people developed multiple levels of identity. Yet, as modernization proceeds apace, the very solutions to the challenges we face create new problems in their turn. The challenges the state now faces are interconnected, cross-sectoral, complex, and replete with unintended consequences.

In the face of such challenges the traditional structure and conceptualization of problem solving (linear, rational, and scientific) are no longer suited for the contemporary societal context, which requires new ways of public administration – an adaptive governance. Thus public administration itself has become and is continuing to become more complex, polycentric, and multi-leveled. It maximizes feedback in order to produce knowledge and to learn. But just because the state is trying to adapt to its societal context, does not imply that the solutions to societal problems are clear. This is the crossroads public administrations are at, and the debate is as ideological as it is technocratic. Changes in the context (for example, natural environment, terrorism, economic challenges) have raised new problems which challenge the institutional order of the state and thus the state seeks to adapt public administration in a manner more appropriate for addressing these problems in the hope that this keeps the state relevant in the face of competing sources of legitimacy and authority.

This book focuses on trends concerning the normative, functional, structural, and procedural characteristics of the institutional order of the state and public administration.<sup>1</sup> Normative institutional aspects are concerned with values like fairness, accountability, lawfulness, and so on, concepts that go beyond the effectiveness and efficiency of public administration. In a globalized world normative aspects also include imperatives of international regulatory cooperation. While the protection of citizens from harm has traditionally been a core function of the state (the *protecting state*), the institutional order has had to adapt to new challenges and risks stemming from a globalized economy and transnational threats (for example, terrorism). The current debates on regulating international financial markets or the preventive retention of personal electronic data (see EU data retention directive [European Union, 2006]) are cases in point. The demands of citizens for more transparency and participation in government decision making entail new procedural and structural arrangements in the institutional order of state and public administration (the *participatory state* and the

*transparent state*). At the same time, governments themselves pursue more transparency and citizen participation in order to (a) find innovative solutions to collective problems outside government itself, and (b) to regain trust and thus legitimacy and authority. Finally, multi-level structures of public administration including national, European, and international levels of decision making have become institutional characteristics of modern governance (the *multi-level state*). These are, at present, dominant characteristics of the institutional order of the modern state and its public administration which are not captured by the state concepts in Table I.1.

## Plan of the book

This book is divided into five parts that are derived from the characteristics of the institutional order of the state mentioned in the previous paragraph. The themes for the parts were selected in light of discussions at the GRIP/SPEA (German Research Institute for Public Administration/School of Public and Environmental Affairs [Indiana University]) conference convened at the German University of Administrative Sciences, Speyer, Germany, on 19–20 July 2012. Of the 48 papers presented and discussed at that conference, 15 were selected and their respective authors were asked whether they would like to reformat their paper to fit the overall objective of this book, which is to provide an international perspective on developments of the state in developed states and administrations. We encouraged a comparative approach to complement the international perspective, but this comparative element (see, for instance, Chapters 5, 6, 7, and 9) was not expected to transcend the individual chapters. That is, a systematic comparison encompassing the entire book was not the objective. Several chapters focus on the European Union and are thus clearly international in scope (Chapters 2, 13, 14, and 15). Furthermore, some authors focus on a specific country and their chapters were included because they drew attention to an important or original trend in the modern state. In these cases we requested that authors discuss the wider applicability of their findings (for instance, Chapters 8 and 10). All authors were also asked to conduct a second round of editing in view of the framework developed for this book.

The opening part addresses normative perspectives on the state, an area of research that the scholars invited for this part have worked on for a good portion of their lives, and an area of research that tends to be overlooked by scholars who write about active and/or enabling states, and by scholars who focus on the effectiveness and efficiency

of government. In the New Public Management era, with its emphasis on performance management and measurement, there is a tendency to forget the importance of reflecting about the state. Instead of hurrying or rushing from one problem to the next, we should step back and reflect on the role and position of the state in society. Fortunately, normative perspectives are becoming important again, especially since the study of public administration is no longer perceived to be only a technocratic, instrumental study and has come to include values that are not purely functional and specific to a task or service.

Rosenbloom zooms in on public values not intrinsic to specific missions or policies, including, for instance, transparency and public participation. He stresses the importance of embedding public management values (efficiency, performance, cost-effectiveness, and core mission) and mission-intrinsic objectives in extrinsic, political system values. Graham discusses how Europe and the United States, despite some differences in value systems and political structure, are striving to achieve a measure of regulatory cooperation. Ringeling argues along similar lines, contending that public administration encompasses more than managerial problems, and must therefore address constitutional issues of state structure and political power. Against the background of the *Rechtsstaat* concept he discusses various types of relations between law and policy: is law a context for policy, or is policy a basis for law? Renewed attention to law and politics as environments within which administration must operate will, thus, augments the dominant Anglo-American model in the study of public administration.

Protection of citizens from harm is, as mentioned earlier, the oldest state function and contributed directly to the establishment of government and public administration. Meeting this function is of existential importance to state and society, especially in the face of international terrorism. The part titled the *Protecting State* concerns traditional tasks of government, but then focuses on how these functions play out in the contemporary environment. Regulation is a classic task of government, and especially challenging in a system that has features of being confederal (for example, the European Union) but is not quite there yet. European integration is a process of, among other things, standardization, and one arena in which that plays out is the debate about whether products (for example, chemical substances, preservatives, food additives) and activities should be labeled as hazardous (which ignores probability of harm) or a risk (which would include a statement about the potential for and severity of harm) (Chakraborty and Creutzfeldt). Another classic task is that of intervention to protect the economic base

on which the state and society depends. The big question therein is what degree of state intervention is reasonable during global economic crises. Comparing Germany and the United Kingdom, a contrast is presented between the crisis response style in liberal market economies (UK) and coordinated market economies (Germany) (Franke). State intervention is less controversial and certainly more necessary when international terrorism is concerned. Should states align their security regulations given interdependencies, and to what extent are state policies influenced by foreign (US) policy versus being rooted in domestic needs? A quantitative analysis, supported by a deeper examination of the German case, illustrates that even given a strong American footprint, security levels and styles are clearly filtered through domestic structures (Lehrke and Schomaker). This part of the book addresses, thus, the interconnectedness of states with regard to policymaking.

The third part, the *Participatory State*, raises issues relevant to any polity that claims to be a representative democracy. What mechanisms are in place to encourage citizen participation? A comparative study of the Czech Republic, Denmark, France, Germany, and the United Kingdom shows how widespread and vast volunteerism is in governance (Bovaird *et al.*). That chapter addresses 'citizen functionaries', and it appears that local public service providers have little knowledge of how important these volunteers are for community safety, local environment, and health. Historically, 'citizen functionaries' (as Raadschelders [1994, p. 436] called them) were very important to local self-government. Responding to major societal changes (think of industrialization, urbanization, and rapid population growth), citizen functionaries were replaced by professional civil servants from the middle of the nineteenth century on. That they play once again a vital role in local government is intriguing, and it would be worthwhile to investigate whether the same is happening in other countries. To date, though, this category of functionaries is seldom investigated by scholars of public administration. Given the increase in volunteerism it is no surprise that this has given rise to volunteer centers (Brudney and An Woodworth). They already exist in 60 countries and this chapter analyzes those in South Korea, following the format of an earlier comparative study in 8 countries. The authors conclude that when operated as nonprofit organizations, these volunteer centers are very successful in harnessing volunteers. Finally, the extent to which participative authority is expressed in the regulation of administrative proceedings merits attention (Kovač and Sever). Administrative Procedures Acts serve as a tool to assure democratic relations between government and citizens via openness, accountability,

and effectiveness. The comparison in this chapter between the United States and Germany reminds us that there is convergence as well as variation. There is convergence in terms of increased citizen participation. Variation is apparent in how the United States focuses more on the protection of parties in procedure and on restricting the potential for abuse of executive authority, while Germany is more oriented toward efficient implementation of public policies. Again, social media have enabled citizens to be much more connected with their governments than ever before.

Part IV on the *Transparent State* has three chapters that clearly go beyond the “open information” stage that started in the early 1970s. Citizens today want more transparency, for instance, through the creation of information exchanges in the public sector (Peled). Being an ‘ocean of isolated databases’ the public sector needs to make sure that information can be easily exchanged between agencies and between individual officials. Peled contrasts a successful Dutch program with that of the American Homeland Security Information System and points out that an automated bureaucratic language would be advisable. That would also contribute to transparency. Can transparency be enhanced by means of digital government (Spina)? Spina describes two fairly recent trends. The first is the Open Government Initiative (OGI), which aims at making data held by governments available to further engage citizens. The second is Nudge, which is an info-based strategy to influence behavior that is gaining momentum. The OGI is also discussed in the next and final chapter in this part, which focuses on how collaborative government is strengthened through online capabilities (Blomgren Amsler and Foxworthy). It appears that using existing network infrastructures, such as those described in Chapters 7 and 8, enhances the potential for collaborative governance.

The final part, *Multi-level State*, contains three chapters on the European Union as a multi-level system of governance. Two chapters are focused on the subnational levels: one on performance changes at the local level in France, Germany, and the United Kingdom (Kuhlmann *et al.*) and one on subnational policy participation networks (Bauer and Studinger). Kuhlmann and co-authors note that there is a positive correlation between political decentralization and horizontal coordinating capacities. They also observe, though, that decentralization of mandatory state tasks results in a decline of voluntary local self-government efforts. That is an interesting observation when considered in relation to Chapters 7 and 8. This topic of networked governance and how it transforms European governments is the subject of another chapter (Corkin

and Boeger). Looking at European policies in various areas, Corkin and Boeger conclude that transnational networks are an important component of European integration. That is to say, neither intergovernmental relations nor neo-functional perspectives can, in and of themselves, explain the process of European integration. In the final chapter Bauer and Studinger compare the importance of the regional government levels in France, Germany, Hungary, Poland, and Spain, and conclude that regional decision makers are generally rather conservative, modest, and incremental in their involvement in the multi-level system. While in the 1980s and 1990s the concept of a “Europe of the Regions” was frequently floated, they note that such a transformation has not occurred.

By way of summary, the institutional superstructure of the state has not fundamentally changed in the past two centuries, but the societal context in which the state and its government operate today has changed dramatically in the past half century. Traditional state concepts that range from limited to extended intervention, as listed in Table I.1, fit the Weberian concept of the state with its emphasis on authority. In this volume we look at state roles as they expand on the initiative and desires of both citizens and government officials. We have no illusion that our characterization of trends in the state (as being protecting, participatory, transparent, and multi-level) is complete or even captures current trends best. However, conceptualizing trends beyond the traditional authoritative role of the state is better than nothing, and with that we can delve into the normative and functional developments that have occurred to varying degrees in the Western world.

## Note

1. And, as mentioned earlier, we consider the politics-administration dichotomy as a situational rather than an essential element of the institutional state order.

# **Part I**

## **Normative Perspectives on the State**

# 1

## Attending to Mission-extrinsic Public Values in Performance-oriented Administrative Management: A View from the United States

*David H. Rosenbloom*

In the United States, the academic fields of public administration and public management are diverging. Public management focuses primarily on the orthodox values of efficiency, cost-effectiveness, favorable benefit-cost ratios, and performance measurement. It is also concerned with the “tools” of public management and the key elements of contemporary collaborative governance, including outsourcing, designing contracts, managing and monitoring contractors, and steering within the framework of networks. It views accountability from the perspectives of obtaining results (outcomes) and creating value for money. Results are overwhelmingly defined in terms of core mission objectives and the operations that are ancillary to their achievement, such as deploying financial, human, and other resources efficiently and cost-effectively. Public administration is also interested in all of the above. However, it retains the field’s historic interest in public values and processes. This analysis contends that although mission-extrinsic public values can be difficult to measure, a balanced scorecard approach is feasible. Moreover, failure to incorporate such values into contemporary performance-oriented public management risks impeding their attainment and adversely affecting the quality and character of government and administration.

### **The problem of mission-extrinsic public values**

Mission-extrinsic public values are problematic in contemporary performance management because they are not typically central or ancillary to the achievement of public agencies’ core missions. In Koppell’s



terms, these values are not ‘mission-related’ (2003, pp. 72–5). Rather they resemble “non-mission preferences.” Mission-related activities can be defined as operations that ‘strike at the center of an organization’s function’ and ‘relate to the utilization of an organization’s core technology or competence’ (Koppell, 2003, p. 73). By contrast, non-mission preferences address ‘the manner in which an agency pursues its policy objectives’. They ‘are often procedural in character’ and ‘distinguished by their broadness’ (Koppell, 2003, p. 73).

Building on Koppell (2003), these preferences can be either integral or extrinsic to achieving core mission objectives. They are integral when they produce better core mission results. For instance, the core mission of the US federal Environmental Protection Agency (EPA) is to ‘protect human health and the environment’ (EPA, 2012). It does this by making rules, such as for clean air, according to non-mission-related procedural preferences for transparency and public participation mandated by the Administrative Procedure Act of 1946, as amended. Arguably, these procedures reduce litigation and/or yield better rules and are therefore integral to the EPA’s achievement of its core mission.

Non-mission-related preferences may also be extrinsic to the achievement of agencies’ core mission objectives. In this case, they: (1) do not support achieving the central purposes, core activities, and *raison d’être* of agencies and programs; (2) are unrelated to an agency’s specialized competencies and technologies; (3) promote preferences that are extraneous to organizational missions and may even impede them; (4) are imposed across all agencies in one-size-fits-all fashion that is not strategically tailored to individual missions; and (5) are not necessarily supported by agency leaders and personnel.

Not all preferences rise to the level of public values. Those that do are generally associated with political system attributes or macropolicy objectives. They enjoy legitimacy by virtue of their authoritative allocation by lawful governmental action and/or their broad and widely accepted base in professional, social, economic, or political practice. They are found in constitutions, public laws, executive orders, judicial decisions, and other official proclamations and regulations that control agency operations as well as in regime values (Rohr, 1978; Rosenbloom, 2012a, 2012b).<sup>1</sup> The National Environmental Policy Act of 1969 (NEPA), which requires federal agencies to develop environmental impact statements for actions significantly affecting the environment, seeks to promote the macropolicy objective of having a ‘national policy which will encourage productive and enjoyable harmony between man and his environment; [...] promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man;

[and] [...] enrich the understanding of the ecological systems and natural resources important to the Nation[...]' (Government of the United States, 1970). As Van Ryzin (2011) and Wichowsky and Moynihan (2008) observe, such attributes and policies are related to trust in government and "citizenship outcomes" of critical importance to vibrant democracy. These outcomes include social capital, efficacy, political participation, and civic engagement. For example, freedom of information relates to the political system attribute of transparency, which promotes accountability and an informed citizenry. It is a mission-extrinsic public value for the overwhelming number of agencies, the National Archives and Records Administration being the primary exception.

A bright line does not always separate mission-extrinsic public values from others or non-mission-related preferences. Here, it is important to draw a distinction between what is extrinsic on the one hand and what is overhead, staff as opposed to line, and mission-supporting activity such as human resources management, budgeting, and information technology on the other. Activities and operations that contribute to an agency's ability to implement its core mission are integral, rather than extraneous. However, distinguishing between the two may sometimes be difficult or impossible. For instance, whether workforce diversity is a mission-supporting component of human resources management for all or some agencies or a manifestation of the mission-extrinsic public value of equal employment opportunity is an open empirical question and the focus of much research on representative bureaucracy (Dolan and Rosenbloom, 2003). Nevertheless, the distinction holds up reasonably well overall and is central to the different foci of public management and public administration.

## US mission-extrinsic public values

It would be difficult to generate a comprehensive list of mission-extrinsic public values in US federal administration. However, in addition to the Freedom of Information Act (FOIA, 1966) and NEPA, the following is an illustrative list of mission-extrinsic public values regarding system attributes and macropolicy objectives:

### Political system attributes (examples):

#### (A) *Statutes:*

- Administrative Procedure Act (1946): public and stakeholder participation in rulemaking, transparency, fairness in administrative adjudication, and accountability and adherence to the rule of law through judicial review of agency actions.

- Federal Advisory Committee Act (1972): stakeholder representation and participation in agency decision making.
  - Privacy Act (1974): protection of individual personal privacy.
  - Government in the Sunshine Act (1976): transparent decision making by multiheaded boards and commissions.
  - Negotiated Rulemaking Act (1990): direct stakeholder participation in writing substantive (legislative) administrative rules.
  - Openness Promotes Effectiveness in our National Government (OPEN Government Act, 2007): improved transparency under FOIA.
- (B) *Executive orders (subject to subsequent revocation and amendment):*
- 12866 (1993): general rulemaking guidelines and obtaining the views of state, local, and tribal governments.
  - 13132 (1999): vibrant federalism.
  - 13576 (2011): efficient, effective, and accountable government.
  - 13579 (2011): periodic review of regulations by independent regulatory agencies.
  - 13610 (2012): identifying and reducing regulatory burdens.
- (C) *Judicial decisions:*
- *Goldberg v. Kelly* (1970): procedural due process in welfare administration.
  - *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission* (1970): promotes principled and neutral decision making in federal agency adjudication.
  - *Citizens to Preserve Overton Park v. Volpe* (1971): promotes the rule of law in agency discretionary actions.
  - *Mathews v. Eldridge* (1976): structure of procedural due process in safety net administration.
  - *Elrod v. Burns* (1976): makes most partisan dismissals of public employees unconstitutional.
  - *Harlow v. Fitzgerald* (1982): public administrators' liability for constitutional torts.
  - *Cleveland Board of Education v. Loudermill* (1985): procedural due process in the dismissal of civil servants.
  - *Rutan v. Republican Party of Illinois* (1990): makes political party affiliation an unconstitutional basis for personnel actions affecting most public employees.
- (D) *US Constitution:*
- Article I, section 9 ('a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time'): transparency.

- Article II, section 3 (the president ‘shall take Care that the Laws be faithfully executed’): rule of law.

### Macropolicy objectives (examples):

#### (A) *Statutes:*

- Regulatory Flexibility Act (1980) and Small Business Regulatory Enforcement Fairness Act (1996): assessing negative impacts of agency actions on small businesses and governments.
- Paperwork Reduction Acts (1980, 1995): reduction of the burdens associated with agencies’ collection information from private entities.
- Assessment of Regulations and Policies on Families Act (1998): consideration of the impact of agency actions on family structure.

#### (B) *Executive orders (subject to subsequent revocation and amendment):*

- 12606 (1987): impact of agency-proposed rules and actions on family structure.
- 12873 (1993): evaluation of environmental aspects of goods and services purchased.
- 12898 (1994): environmental justice.
- 13101 (1998): recycling and reducing waste.
- 13148 (2000): environmental management systems (for example, to reduce pollution).
- 13423 (2007): environmental sustainability in purchasing goods and services.
- 13524 (2009): acquisition of environmentally friendly products (for example, energy efficient, recycled, and so on).
- 13621 (2012): educational excellence for African Americans.

#### (C) *Judicial decisions:*

- *Department of Defense v. Federal Labor Relations Authority* (1994): protection of personal privacy under the Privacy Act and Freedom of Information Act.
- *Board of County Commissioners, Wabaunsee County v. Umbehr* (1996): protects free speech rights of government contractors.
- *National Archives and Records Administration v. Favish* (2004): protection of personal privacy under FOIA.

#### (D) *US Constitution:*

- Article VI, clause 3 (‘no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States’): religious freedom.

- Various amendments guaranteeing civil rights and liberties, informational and decisional privacy, and equal protection of the law.

Taken together, these and other mission-extrinsic public values enable government to leverage agencies' legal, organizational, staff, and financial resources in the pursuit of objectives that are extraneous to the main purposes for which such administrative units were created and empowered.<sup>2</sup> They enable government to use public administration as a tool not just for attaining core mission results but also for contributing to the achievement of a variety of political system and macropolicy goals. They determine what substantial components of national, state, and local administrative systems and their personnel do. They contribute a great deal to the definition of what public administration is.

### **The institutional politics of mission-extrinsic public values**

Public values, whether mission extrinsic or otherwise, are politically charged. In the United States, presidents and congresses often impose them on public administration as part of a separation of powers struggle over governmental process and policy preferences. In 1946, Congress repositioned itself vis-à-vis the federal bureaucracy by enacting the Administrative Procedure Act (APA), reorganizing itself, calling on its committees to exercise 'continuous watchfulness', defined by some members as 'supervision', over the agencies and programs under their jurisdictions, and gaining greater control over agencies' spending on public works projects (Rosenbloom, 2000). These measures brought greater transparency to administrative activity. Congress sought to turn the agencies into its adjuncts or extensions for legislative functions, most notably rulemaking. The act was also viewed as 'a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government' (US Congress, 1946, p. 2190; Rosenbloom, 2000, p. 38). President Harry Truman signed the APA, which was opposed by some agencies, but supported by his attorney general, Tom Clark, and the Bureau of the Budget, although the latter expressed concern that it reflected 'legalistic rather than administrative thinking' (Brazier, 1993, p. 329; Rosenbloom, 2000, p. 35). President Lyndon Johnson signed FOIA even though he thought that 'the goddam bill will screw the Johnson administration!' (Warren, 1982, p. 180). By contrast, President Gerald Ford vetoed major amendments to FOIA in 1974 only to witness an override and their enactment by Congress.

Likewise, presidents can use executive orders, such as those mentioned earlier dealing with environmental matters, to infuse administrative operations with mission-extrinsic public values and to extend the scope of government. They often do this in the face of congressional opposition or intransigence. For instance, in April 2012, an increasingly frustrated President Barack Obama exclaimed, 'If Congress refuses to act, I've said that I'll continue to do everything in my power to act without them' (Savage, 2012). In September, considerable partisan criticism in Congress notwithstanding, he issued Executive Order 13627 on Strengthening Protections Against Trafficking in Persons in Federal Contracts.

The federal judiciary also plays a major role in US public administration. It forces mission-extrinsic public values into administration by defining the constitutional rights of individuals who come into contact with agencies as clients and customers, public employees, prisoners, public mental health patients, and contractors, and in street-level regulatory encounters (Rosenbloom *et al.*, 2010). In efforts to remedy breaches of constitutional rights, federal district courts have taken control of state prison and local public school systems, public mental health facilities, and racially discriminatory public personnel hiring and promotion processes. The courts have also done much to establish the boundaries of public employees' and contractors' liability for constitutional torts and the scope of judicial review of administrative action. Administrative rulemaking, adjudication, and enforcement processes are heavily affected by judicial decisions as is compliance with transparency statutes, the Privacy Act, and a host of administrative law regulations. The judiciary has been so active in infusing public administration with constitutional procedural due process, equal protection, and First Amendment rights that, in one view, it has entered into a 'partnership' with administrators (Bazelon, 1976).

### **Can the public administration community create mission-extrinsic public values?**

The desirability of mission-extrinsic public values is inherently contestable. Professor Steven Kelman, a leader of the public management movement, opposes tacking them onto agency operations. He maintains that, 'when we try to do everything, we accomplish nothing' (Kelman, 2011). Similarly, leading administrative law scholars question whether the cumulative imposition of mission-extrinsic values overly burdens agency rulemaking and call for a "regulatory impact analysis"

impact analysis [...] in deciding whether to undertake any further such requirements' (Strauss *et al.*, 1995, p. 217). Other scholars take a less global stance in arguing against forcing specific values on administration. For example, there has been a lively debate on the desirability of using cost-benefit analysis and open meetings in regulatory administration (Coyle, 1995; Strauss *et al.*, 1995, pp. 950–1; May, 1997; Shapiro, 2010). An even broader debate involves the question of whether these values can be imposed by the public administration community of scholars, practitioners, and pracademics (see Lynn, 2009; Moynihan, 2009 for some of the parameters of the debate).

This question was hotly discussed during the advent of the "new public administration" in the late 1960s and 1970s. Developed out of the 1968 Minnowbrook Conference, the new public administration called on public administrators to use their positions to promote social equity, now accepted by many as the "third pillar" of public administration, along with economy and efficiency (Frederickson, 2010). Although ill-defined, promoting social equity generally means using public administration as a vehicle for improving the circumstances of politically and economically disadvantaged groups and making government more inclusive (Rosenbloom, 2005; Svava and Brunet, 2005). Thompson (1975, p. 66) vehemently attacked the effort to impose this value on public administrative practice, viewing it as 'theft of the popular sovereignty'.

Thompson's vitriolic, wide-ranging critique of the new public administration may have detracted from his central point. He raised a legitimate two-pronged question that remains unresolved. First, is public administration a profession like law or medicine that can impose values and ethical standards on its practitioners? Certainly, associations such as the American Society for Public Administration (ASPA) can and have developed ethical codes (ASPA, 2012). However, unlike law, medicine, and other professions, no license or membership in such associations is required to practice public administration. Neither can ASPA discipline its members for ethical breaches or maladministration. Mission-extrinsic public values and the first two "pillars" of public administration are officially sanctioned in formal legislative, executive, and judicial action. However, this is not dispositive for many members of the public administration community who view a commitment to public service as incorporating a host of values that do not necessarily find their way into official pronouncements or regulations. For instance, the ASPA Code of Ethics has included encouraging 'others, throughout their careers, to participate in professional activities and

associations' (ASPA, 2012). Today, public service motivation<sup>3</sup> stands alongside social equity as a non-mission preference that many view as an aspect of professionalism.

Second, if public administration is a profession, it is a profession of government (Chapman, 1959). As such, can private entities create its values or must they be established through governmental action and/or long-standing accepted practice? In democracies, public administration is ultimately subordinated to the electorate, however attenuated the mechanisms for control, accountability, and legislative oversight may be. For public administrators, believing that something is in the public interest is not license to pursue it. "Guerrilla government" can promote the public interest, but its legitimacy is dubious at best (O'Leary, 2006). Social equity may promote fairness, but it may also violate the US Constitution's equal protection clause (*Adarand Constructors v. Peña*, 1995).

Not being able to resolve these issues definitively, the public administration community can fall back on the claim of a legitimate role in *advocating* for mission-extrinsic public values. But the limits are unclear. US constitutional law places greater restrictions on the freedom of speech of public employees than on that of ordinary citizens and legal residents (*Garcetti v. Ceballos*, 2006; Rosenbloom *et al.*, 2010, pp. 196–200). The conundrum is that while the safest approach to defining and advocating mission-extrinsic public values is to promote those enjoying some form of official recognition, it is also one that is resistant to change.

## Measuring mission-extrinsic public values

Measuring performance on mission-extrinsic public values promotes transparency while incurring many of the problems encountered when assessing the achievement of core mission objectives (Kravchuk and Schack, 1996). Nevertheless, because what one measures is generally what one gets, ignoring mission-extrinsic public values in performance measurement and management risks giving short shrift to many of the qualities that define political system attributes and contribute to the attainment of macropolicy goals. Performance on core mission objectives, by agencies either individually or collectively, is not a "bottom line" that determines how the administrative state is operating in terms of the overall quality of government and public policy.

The fact that mission-extrinsic public values are often "soft" complicates, but does not obviate, the measurement problem. It is much easier to measure tons of trash collected, miles of roads paved, crimes solved,



transportation and occupational safety, disease control, and many other governmental objectives than mission-extrinsic public values such as individual privacy and environmental justice. Approximately 2,300 years after Aristotle wrote *Politics* (1926), we still lack a universally accepted definition of “justice.” Their weaknesses notwithstanding, surrogate measures are often better than none at all.

Executive Order 13514 on Federal Leadership in Environmental, Energy, and Economic Performance (2009) provides an interesting example. Under the order, in 2010 President Obama set goals for reducing greenhouse gas emissions by the federal government by 28 per cent by 2020. Based on the order and related requirements, agencies formulate and publicize annual sustainability plans, which, of course, are mission extrinsic for all but the handful whose core missions involve environmental protection. The Office of Management and Budget (OMB) began developing scorecards on agency performance in 2011. In June 2012, agencies made these OMB Sustainability and Energy Scorecards public (see [Performance.gov](http://Performance.gov), 2012). Presumably, the scorecards incentivize agencies to reduce greenhouse emissions even when it is wholly irrelevant or even antithetical to their ability to produce core mission results (for example, limiting desirable employee travel).

Whether using scorecards or other measurement approaches, the following can often serve as generic output measures for mission-extrinsic public values:

- *Comparative performance*: Efficiency, cost-effectiveness, best practices, and benchmarking.
- *Compliance*: Energy reduction, tons recycled, requests for information satisfied, timeliness, and complaints and lawsuits filed.
- *Adjudication measures*: Efficiency (timeliness), fairness (as perceived by the parties), competence (sustained on appeal), and impact on administrative systems (cumbersomeness, burdensomeness, and willingness of administrators to take action such as firing poor performers).
- *Customer/client satisfaction*: Surveys and comparisons among governmental and other organizations.

Generically measuring outcomes is more problematic. They are often beyond an agency’s control, multicausal, and specific to individual public values rather than to overall administrative performance. For instance, performance measures for FOIA compliance would include timeliness, percentage of requests wholly or partly fulfilled, litigation

rates, and agencies' successful legal defense of withholding information. Measuring the impact of an agency's transparency on the public values of fostering an informed and engaged citizenry would be much more difficult. Taking a broad view of some mission-extrinsic public values, including transparency, family functioning, and environmental justice, would require assessing citizenship outcomes (Wichowsky and Moynihan, 2008).

More narrowly, some mission-extrinsic measures resemble those used for core mission objectives:

- *Reduction measures*: Examples include family dissolution, public corruption, carbon footprint, and solid waste generation.
- *Production measures*: Examples include federal workforce participation in Constitution and Citizenship Day (September 17, annually) (OPM, 2012), contracts allocated to small businesses, FOIA requests satisfied, and family stability.
- *Trust in government*: Surveys.
- *Gross national happiness/wellness measures*: Use of surveys, statistical data, and metrics to assess economic, environmental, physical, mental, workplace, social, and political wellness focusing on such qualities as consumer debt, inflation, income distribution, pollution, noise, congestion, public health, clinical depression, unemployment, workplace complaints and lawsuits, divorce rates, domestic conflicts, crime rates, individual freedom, and foreign conflicts (Wikipedia, 2012).

Developing agreed-upon measures for mission-extrinsic public values does not fully resolve measurement difficulties. As in the case of core mission objectives, prioritizing values and dealing with trade-offs among them is also a consideration. To date, the balanced scorecard appears to be the favored approach for assessing performance on noncommensurate, unprioritized concerns. It requires attention to multiple 'drivers of future performance' in annual or multiyear performance measurement and evaluation cycles (Kaplan and Norton, 1996, p. 8). For a typical business, this might include measures for 'financial, customer, internal business process, and learning and growth' (Kaplan and Norton, 1996, p. 8). Keeping all the components in balance all the time is not required. Different measurement approaches can be used for each aspect, including even rudimentary traffic light green-yellow-red scorecards (Rosenbloom, 2007). If an organization is performing poorly in one or more categories, it should take corrective action. A scorecard that includes both mission-extrinsic public values and

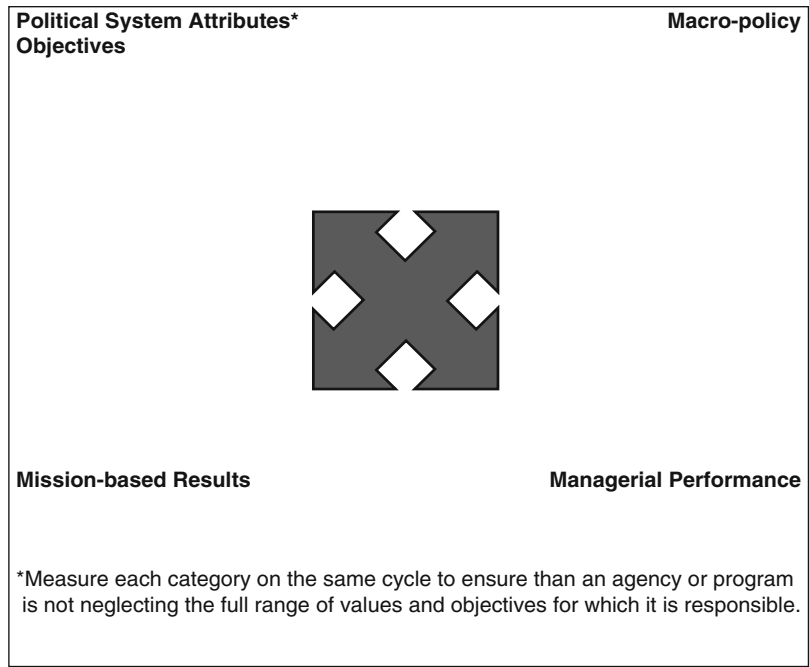


Figure 1.1 Scorecard including both mission-extrinsic public values and core mission performance

core mission performance might look something like that given in Figure 1.1.

**Conclusion: putting core mission performance in its place**

Core mission results are neither everything nor the only thing in public administration. They are clearly trumped by political system attributes, as US courts have frequently pointed out. For example, in *Stanley v. Illinois* (1972), the US Supreme Court noted that:

the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy governmental officials no less, and perhaps more, than mediocre ones.

In *Hamilton v. Love* (1971), a federal district court brushed aside the problem of trade-offs by proclaiming that 'Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights. If the state cannot obtain the resources to detain persons awaiting trial in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons'. In *Jordan v. Gardner* (1993), a court of appeals judge contended that 'Single-minded inspector Javert is a monster, even though he focused only on his duty' and

a bland American civil servant can be as much of a beast as a ferocious concentration camp guard if he does not think about what his actions are doing [...] Half the cruelties of human history have been inflicted by conscientious servants of the state. The mildest of bureaucrats can be a brute if he does not raise his eyes from his task and consider the human being on whom he is having an impact.

Macropolicy objectives served by mission-extrinsic public values such as environmental sustainability and environmental justice are also of undeniably great importance.

The narrowly focused public administration orthodoxy of the 1930s collapsed because it refused to recognize that political concerns are embedded in administrative theory and practice (see Waldo, 1948; Appleby, 1949). Thirty years ago, I took the subsequently widely accepted position that public administration includes at least three perspectives embedded in the US separation of executive, legislative, and judicial powers: management, politics, and law (Rosenbloom, 1983).<sup>4</sup> Later, as this framework found use outside the United States, I recognized that all governments have these functions however they may be configured and all three are involved in public administration. As Professor Radin contends in *Challenging the Performance Movement* (2006, p. ix), with its heavy emphasis on performance, public management can drive out broader governmental values and inevitably occupy only a limited theoretical and practical space within public administration if it fails to 'acknowledge [...] the complex goals of public action and, instead focus[s] only on efficiency outcomes'. Although mission-extrinsic public values can be difficult to measure, failure to incorporate them into contemporary performance-oriented public management risks impeding their achievement, adversely affecting the quality and character of government and administration, and undercutting the attainment of macropolicy objectives.

## Notes

This chapter builds on Rosenbloom (2012a, 2012b) and Baehler *et al.* (2014).

1. Rohr (1978, pp. 65–6) defines regime values as ‘beliefs, passions, and principles that have been held for several generations by the overwhelming majority’ of a nation’s people and found in public law, ‘the writings and speeches of outstanding political leaders, major [...] [c]ourt opinions scholarly interpretations of [a nation’s] history, literary works of all kinds, religious tracts and sermons, and even the rhetoric of standard [patriotic] oratory’.
2. As noted earlier with regard to the National Archives and Record Administration, general mission-extrinsic public values may constitute a core mission for some agencies. For instance, the executive orders on the environment are mission based for the EPA.
3. The literature on public service motivation does not conclusively link such motivation to performance or establish whether successful performance generates public service motivation. See Petrovsky (2009).
4. The fourth edition of my text (now with Robert Kravchuk and Richard Clerkin), *Public Administration: Understanding Management, Politics, and Law in the Public Sector* (1998), which is based on this framework, was listed as the fifth most influential book in the field published from 1990 to 2010. See Kasdan (2012).

# 2

## Europe and the USA: The Uphill Quest for Regulatory Cooperation

*John D. Graham*

### Introduction

From 2001 to 2006, I served President George W. Bush as his “regulatory czar” (a phrase coined by the *New York Times*), a Senate-confirmed post known formally as the Administrator of the Office of Information and Regulatory Affairs (OIRA) within the US Office of Management and Budget (OMB). My job was to oversee the new regulations issued by the Cabinet departments, ensuring that adequate impact assessments (usually cost–benefit analyses) were performed to support proposals (Graham, 2008). But I was also given an intriguing assignment that is not typical for the OIRA Administrator: go to Europe and foster more regulatory cooperation between the European Union and the US federal government.

With this unexpected assignment, I was not usurping the functions of the State Department, the US Trade Representative, or the National Security Council. In fact, it was the senior staffs of these organizations who urged me to take on this assignment, helped define my task, and set some performance expectations for my assignment.

In this chapter, I share my experiences in this multiyear effort. What I learned was that the structures of the European Union and the US federal government are different in some fundamental ways that discourage regulatory cooperation (Majone, 1990). Despite such differences, the Bush administration undertook some modest initiatives to buttress Europe’s nascent “better regulation” movement (Allio *et al.*, 2004; Wiener, 2006a, 2006b), with the hopes that a more analytic process in the European Union would make it easier for cooperation with the US regulatory system. Meanwhile, my job back at home was to strengthen the analytic tradition in the US regulatory system.

While progress was slow, procedures in the EU have become more similar to those in the United States over the past 15 years (2001–13), although not due only or primarily to the efforts of the George W. Bush administration. The theme of greater trans-Atlantic regulatory cooperation did not end in 2009, as the Obama administration has reinforced the theme. I conclude that the odds will always be against meaningful US–Europe regulatory cooperation but the case for cooperation is too potent to ignore and a common approach to regulatory impact assessment in the United States and the EU may be the next step of progress.

### Learning from the precaution debate

Several months after my Senate confirmation, I was invited by the German Marshall Fund (an NGO that promotes better US–Europe relations) to attend a “dialogue” in Bruges (a charming small town near Brussels) about the role of precaution in regulatory risk management. The participants included some top career officials in the European Commission (EC) and some academics from Europe and the United States.

As the OIRA staff briefed me on this event, I was stunned about the extent of discord that had occurred between the Clinton administration and the EC on the subject of the precautionary principle. In simple terms, the principle suggests a “better safe than sorry” posture toward new but possibly hazardous technologies. In theory, Europe was considered more precautionary than the United States, but I knew that the empirical truth was much more complex (Hammitt *et al.*, 2005), as policies toward lead, environmental tobacco smoke, and diesel engine exhaust were much more precautionary in the United States than in much of Europe.

Even though this principle was written into the Amsterdam Treaty (1992) that helped establish the European Union, my predecessors in the Clinton administration took the position that the precautionary principle did not exist. As an academic, I had written several analytic papers on how the precautionary principle could be improved through application of modern decision analysis (Graham, 2001; Graham and Hsia, 2002). I reluctantly agreed to stand behind the Clinton position as a matter of international law – primarily since I was prepared to accept the legal views of administration lawyers – but I took pains to emphasize to my European colleagues that the concept of precaution was prevalent in a wide variety of US regulatory laws from food safety

to environmental protection. Instead of debating whether a principle exists, I urged a stronger focus on how science and economics could be coupled with precaution to formulate smarter regulatory policy. And I knew that was the stance that the Commission had taken in its official 2000 “Communication” on the precautionary principle, a document I had scrutinized as a Harvard professor and knew to be thoughtful and nuanced.

I also used the occasion of the Bruges dialogue to alert my European colleagues to a potential danger of an overly elastic view of the precautionary principle: it could be used by the Member States of Europe to undermine the authority of the EC (Graham, 2002). Some of the Europeans required no warning, as the European Union had recently won a case against France in the European Court of Justice after France – citing the precautionary principle – blocked importation of British beef on the grounds that French beef might be safer than British beef. The Court ruled in favor of the Commission (and the British), arguing that even actions taken pursuant to the precautionary principle require at least some scientific support. The Commission’s 2000 Communication goes further and treats risk assessment and precaution as compatible and necessary ventures (also see Chapters 4 and 6).

From the informal discussions with European officials and academics, I gathered a shared sentiment in favor of putting the fight about precaution behind us. The discussion should be about pathways to better regulation based primarily on science, economics, and impact assessment.

### **Low expectations, many disputes, blame for both sides**

Ironically, the good news for me was that in 2002–3 relations between Europe and the United States seemed to be at an all-time low. It would be difficult for me to make matters worse! The invasion of Iraq, coupled with the absence of much Continental European support, was the big topic in US/EU relations. At the same time, there were a series of persistent, less visible, and annoying disputes about regulatory policy, especially regulations that impacted the business community in the United States and Europe. Based on my staff briefings, I quickly gathered that there were some good reasons why the Europeans were griping about the US regulatory system. Here are some illustrative examples.

Having recognized the scientific reality of global climate change, the Europeans were trying to foster a coordinated, global regulatory program to curb greenhouse gases through an international treaty



written in Kyoto, Japan. In 2001, President Bush responded that he had no intention of submitting the Kyoto Protocol for Senate ratification, despite the years of work invested by European leaders and Vice President Al Gore. As a result, it appeared that European businesses would soon be incurring costs for control of greenhouse gases that would not be incurred by businesses in the United States. More importantly, without joint leadership from Europe and the United States, the prospects of recruiting China and India into a global program were vanishingly small.

Meanwhile, the United States was busily adding new regulatory programs on other issues without even consulting our European colleagues. The US Congress, with belated support from the Bush administration, had recently enacted the complex “Sarbanes–Oxley” law aimed at reducing corporate fraud, in part a response to public outrage about the Enron accounting scandal. The Europeans were irritated about the lack of consultation because many businesses based in Europe were eager to join the New York Stock Exchange. But the drafting of the Sarbanes–Oxley law seemed to give little recognition to European accounting standards.

I also became fascinated by a crazy difference between auto safety rules in the United States and Europe. Compliance with auto crash protection standards is measured with a technical procedure: crashing a test vehicle into a fixed barrier and measuring the forces on the head and chest of the crash dummy. If the forces are below a numerical threshold (for example, due to padded dashboards or an inflatable airbag), the vehicle is judged to be in compliance with regulation.

To make a long story short, the European and American regulators, despite numerous conferences and informal negotiations over many years, could not agree on the conditions of the crash test or the design of the crash dummy. As a result, vehicle manufacturers such as Ford Motor Company and (then) DaimlerChrysler Corporation were compelled to design their European vehicles slightly differently from their American vehicles, and then crash test a new model twice: once with an American dummy and again with a European dummy.

To make matters worse, the US dummy was not permitted to wear a lap/shoulder belt in the crash test, whereas the European dummy was required to be belted. The US preference for the unbelted test was a dinosaur, since all 50 states had enacted laws requiring motorists to wear safety belts, laws that had been pioneered two decades earlier by the Swedes, the Germans, and the Australians. This conflict in auto safety regulation is a classic illustration of what we called the failure of

regulatory cooperation. On this one, though, I was convinced that the United States, not Europe, was the dummy.

My staff briefings, though, gave me plenty of reasons to be skeptical about the technical quality of EU regulatory programs. I learned that the Clinton administration had recently won a lawsuit against Europe in the World Trade Organization in a case involving dairy cows that were treated in the United States with hormones to boost their productivity. Europe was blocking the importation of selected dairy products on the dubious ground that hormone treatments were unsafe for the animals and/or humans. We suspected that the Europeans were engaged in covert trade protection in dairy products, and the WTO agreed with us. However, the Europeans, rather than relaxing their import restrictions, were scrambling to assemble yet another panel of European “experts” who would conclude that the dairy products sold in the United States might be unsafe.

At about this same time, the Bush administration was considering another lawsuit against Europe for failure to allow genetically modified seeds to be sold in European countries. While such seeds were widely used to boost corn and soybean yields in the United States, US regulators were unable to persuade European regulators to accept our position in favor of genetic modification of seeds. My reaction, based on a staff briefing, was that our plan to sue Europe in the WTO was an act of desperation. Even if we won the lawsuit, the remedies at the WTO are so weak that little would be accomplished. Ultimately, we won the litigation, but Europe did little to change their policy.

And finally there was an effort in Europe to develop comprehensive industrial chemical regulation for environmental protection, the so-called “Registration, Evaluation, Authorization of Chemicals” (REACH) program. Pushed by the Swedes and other northern European countries, REACH was designed to shift the burden of proving chemical safety from government to industry.

In the White House, the worries were that REACH was as much an economic competitiveness initiative as a public health or environmental initiative. Would REACH produce a flood of new regulations favoring German companies, such as BASF and Bayer, to the competitive disadvantage of US-based companies? For small American businesses trying to do business in Europe, REACH seemed like a quagmire in the making. And even if there was no adverse trade impact, the REACH proposal was quite complex and would impose substantial testing costs on chemical manufacturers around the world. The public health and environmental benefits of REACH were speculative, even though I shared the view of

the northern Europeans that the chemical industry should shoulder the analytic burden of proving the safety of their products – assuming the standard of safety was a reasonable one.

With helpful staff briefings on the ugly state of EU–US regulatory cooperation, I wondered what could possibly be done to create a better climate for cooperation.

## **A first official visit to Brussels**

At a White House meeting in 2002, a decision was made to send me to Brussels to begin a dialogue on regulatory cooperation. The theory was that, rather than sending a business-oriented Texan with close ties to the President, it made sense to send a former Harvard professor who had already written books on regulatory programs covering everything from cars to chemicals. Maybe the European officials would take seriously the views of an academic (even if he was an American), or at least that was the cynical thinking of some of my skeptical administration political operatives who felt regulatory reform in Europe was unlikely to happen.

My objectives during the visit were to (1) assess the extent of European interest in “better regulation” (the European term for what we call regulatory reform or smart “evidence-based” regulation) and (2) develop some sympathetic contacts in the EC, since the US State Department was convinced that the Commission, rather than the European Parliament or the Council, was the dominant source of regulatory power in Europe.

The US Mission in Brussels organized my visit and, with a dose of good humor, trained me on how to behave properly on such a visit. Even though I was a tenured Harvard professor, speeches would not be appreciated. No overt advocacy of US regulatory practices would be helpful. And be sure to have a light touch on any sensitive discussions of the tough issues: genetically modified foods, climate change, and so forth. I was instructed to focus on “horizontal” regulatory cooperation, which meant cross-cutting “better regulation” procedures such as regulatory impact assessment, transparency, peer review, and stakeholder consultation, rather than on “vertical” or sectoral cooperation (chemicals, autos, information technology, and so forth). Most importantly, take any opportunity to explain what OIRA is and how it operates in the US regulatory system.

Over a period of several days, I had meetings with top-level career civil servants in the various Directorate-Generals: DG Enterprise, DG Environment, DG Internal Markets, DG SANCO, and so forth. I also met

the Commissioner of DG Enterprise and the personal staffs ("cabinets") of several other Commissioners. I found my European colleagues quite interested in OIRA's primary mission: cost-benefit review of regulatory proposals from Cabinet agencies such as the Department of Labor, the Department of Transportation, and the Environmental Protection Agency. They were stunned to learn of OIRA's power to block new regulatory proposals, even though I tried to explain that the blocking power was rarely used because we negotiated changes to agency analyses and rules. They were impressed that a staff of 50 career civil servants at OIRA was tasked with overseeing the entire federal regulatory establishment housed in Cabinet agencies. And they noticed that OIRA had power to change regulatory policy as well as review agency impact assessments. In other words, OIRA was engaged in both policymaking and analytic reviews.

I returned from Brussels impressed with the quality of the civil servants in the EC. They seemed well educated, motivated, savvy, and deeply dedicated to European-level governance. Unfortunately, I harbored mixed emotions about Europe's "better regulation" agenda because it was a good news/bad news story.

The good news was that Europe was making a start, partially in response to growing public unease about the quality of lawmaking in Brussels, partially in response to concerns about the future competitiveness of the European economy (the "Lisbon Agenda" of 2000), and partially due to a thoughtful 2001 report on better regulation by an influential French public administrator named Dieudonne Mandelkern (Mandelkern, 2001). A "white paper" on European governance had been issued in 2001, calling for more openness, responsibility, and accountability in lawmaking (European Commission, 2001). In 2002 an "action plan" on regulatory simplification had been issued by the Commission in conjunction with a communication calling for more use of regulatory impact assessment (European Commission, 2002a, 2002b). I was particularly impressed with the interest in the analytics of impact assessment among selected staff members in DG Enterprise, DG Internal Markets, DG SANCO, and DG Environment. And even the cumbersome European Parliament and European Council were committing to undertake impact assessments of amendments to Commission proposals (European Union, 2003a, 2003b; Renda, 2006).

The bad news was the absence of political leadership and the lack of accountability for follow-through on better regulation. The Commission documents spoke of accountability, but I saw no institutional mechanism in the Commission for ensuring that impact assessments would

be done, be done well, and be utilized in the formation of legislation. The assumption seemed to be that everyone in the Commission would be accountable for better regulation, on top of the responsibilities that they already have as regulators. Unless analysis played a stronger role in Europe, I did not foresee a pathway to genuine regulatory cooperation.

Consider first the accountability challenge. During my visit, everyone I met seemed to be a regulator. No one in the Commission appeared to have the job of overseeing the regulators. Although there were some key lawyers working on the better regulation agenda in the Secretary General's office (the main central office in the Commission), there was no OIRA-like operation and no bureau charged with ensuring the integrity of impact assessment, consultation, and transparency. At a White House briefing soon after I returned, I explained in frustration to the White House staff that there was no one for me to talk to since the Commission did not have an OIRA-like unit.

Nor was there visible political leadership of the better regulation agenda. While there was significant "bottom-up" interest inside the Commission and no discernible political opposition within the Commission, I saw no evidence that a leading EU politician was driving the better regulation agenda. The President of the Commission from 1999 to 2004 was a center-left former Italian prime minister named Romano Prodi. While Prodi was quite knowledgeable on economic matters, he seemed to be riding rather than driving the modest better regulation agenda.

Despite my mixed emotions, the US Mission in Brussels and the State Department in Washington, DC were elated. They had touched base with Commission officials and found them delighted that the United States was doing something to improve relations between Europe and the United States. Rather than send another State Department bureaucrat, Bush had sent the leader of his own regulatory reform operation at OMB. And they saw (correctly) that I was genuinely trying to learn how the European Union was organized, what role the Commission played, and how the process of better regulation could be accelerated on both sides of the Atlantic. They could also sense that I was deeply impressed with the concept of the European Union and a bit worried that its respect among European publics was not at a high point.

### **An OIRA in the European Commission?**

In 2003, I walked out of a White House meeting stunned by the boldness of a new assignment I was given. My mission was to introduce

key officials in Europe to the idea of an OIRA-like operation within the European Union. It could be located in the Parliament, the Council, or (my preference) the Commission.

In hindsight, it seems simply unbelievable that US government officials in the White House would plot how to redesign the European system of governance. But that is effectively what we did; indeed, the White House staff and State were intrigued by the idea of creating an OIRA-like operation in the Secretary General's Office of the Commission. Fortunately, the idea was not completely nutty, as some good-government think tanks in Europe were already advocating a move of this sort (Ballantine, 2001; Allio *et al.*, 2004) and OECD had been promoting the idea for over five years, in part based on the US experience with OIRA (OECD, 1997). To put it mildly, I now acknowledge that the entire venture was a bit naïve but I was too unsophisticated about the design of the EU to realize it.

The strategy was to take our "better regulation" message to the capitals of the Member States in Europe, and thereby stimulate pressure on Brussels to establish an OIRA-like operation. The Department of State's reasoning behind my itinerary (five cities in five days) was as follows. We need not waste time on visits to the United Kingdom and the Netherlands because officials in these countries were already known to be sympathetic with the need to "reign in" the Brussels' regulators. Sweden and Belgium were considered beyond persuasion. The targets for my visit became, in order, Copenhagen, Berlin, Rome, and Paris. A final stop in Brussels was also scheduled.

The guidance to me from the US Mission staff was again simple: no long speeches, ask questions about why Brussels is becoming unpopular, and do not advocate that the Commission specifically should adopt an OIRA-like office. Take any opportunity to explain the mission of OIRA and how it operates in the United States. Do not hesitate to explain the limitations as well as benefits of the OIRA model, and point officials to the OECD reports on regulatory reform, reports that recommend creation of centralized regulatory oversight bodies in all OECD countries.

At this time, the OECD, while well respected throughout Europe, was a sensitive topic in Brussels, because the European Union had been resisting for several years an OECD review of the performance of the EU's regulatory system. The EU argued that it was a region, not a country, and therefore the European Union was outside the scope of OECD's country-by-country reviews. I found it curious that Brussels was arguing that, even though the OECD country reviews of the United States,

Germany, France, and Poland had proven to be insightful, no OECD review of the regulations initiated by the EC was likely to be fruitful.

### **Five cities in five days**

The whirlwind tour of the key Member State capitals, including meetings and lunches with high-level government officials, happened so fast that by the time I arrived in Brussels, for a closing meeting at the Secretary General's Office, I had no clear recollection of everyone I had met. As a visitor from the US government, everyone was so respectful and polite that I did not know what my hosts really thought.

As I sat down to speak with a senior attorney in the SG office, he smiled and indicated that he understood the purpose of my visit. He added that his phone had been ringing all week. While the case for an OIRA in the Secretary General's Office was plausible and had some support inside the Commission and in some Member States, he made it crystal clear that it was not going to happen in the foreseeable future. Neither France nor Germany was supporting the idea. A centralized power like OIRA, he explained, would not work in a collegial body such as the EC. Unlike the President of the United States, the President of the EC was only one vote among a team of Commissioners who vote on each other's regulatory initiatives. Giving an OIRA-like unit a power of veto would effectively undermine the voting process of the Commission, he explained.

On the way to the airport for my flight back to Washington, the US Mission staff strived to boost my morale because it was apparent that I was disheartened. I thought that my mission was a failure and that we had proposed a procedure that was incompatible with the basic design of the European Union. They knew – far better than I could possibly know – that institutional reforms do not happen overnight. In their eyes, we were only at the beginning stage of a long campaign and they seemed to believe that we were making progress.

I returned to OMB and settled back into my normal life as Bush's regulatory czar (Graham, 2008). The year 2004 was a slow one for better regulation on both sides of the Atlantic as Bush faced a tough re-election fight against Massachusetts Senator John Kerry and the Prodi era was coming to an end in Brussels. Nobody knew who would succeed Prodi as President of the EC. It is not an elected office (in my humble view a key design flaw of the EC, which is composed of no popularly elected officials), and the entire process of selecting a President of the Commission is not transparent. Nonetheless, after Bush's close

re-election victory (November 2004), an obscure document from the EC caught my eye: a Commission staff working paper entitled *Impact Assessment, Next Steps: In Support of Competitiveness and Sustainable Development* (European Commission, 2004). I marveled that the better regulation team at the Commission was continuing to push the ball forward, however modestly and cautiously.

## The Barroso agenda

I soon learned that the new President of the EC was the former Prime Minister of Portugal, a center-right politician named Jose Manuel Durao Barroso. I was stunned and somewhat worried about a rapid change in the politics of better regulation that occurred. Barroso was determined to jump-start the better regulation agenda on the basis of a pursuit of jobs and prosperity. I often heard Europeans say that the “Lisbon Agenda” in Europe was to improve the economy, security, and the environment, but Barroso made it clear that he would deepen the economic “pillar.”

Barroso selected a veteran German politician named Gunter Verheugen to take the lead on better regulation. Verheugen had previously been a Commissioner under Prodi where he had led the successful enlargement of the EU. He accepted Barroso’s offer to become Commissioner of Industry and Enterprise and one of Barroso’s five vice presidents, thereby giving Germany a powerful voice in the Commission. Although Verheugen’s roots were as a center-left politician in Germany (from the Social Democratic Party), he also had strong ties to German industry and labor unions and was determined to slow the pace of new business regulations flowing out of Brussels.

The Barroso Commission stimulated a flurry of better regulation activity, starting with a March 2005 Communication entitled *Better Regulation for Growth and Jobs in the European Union* (European Commission, 2005a, 2006). The fine print included the following:

- mandatory impact assessment on all new legislative proposals (boosting the number of assessments from 50 in 2004 to 100 in 2005);
- withdrawal of proposals in the pipeline that were not supported by impact assessments (European Commission, 2005b);
- an independent evaluation of the integrity and quality of the Commission’s impact assessments (Evaluation Partnership, 2007);
- a plan to modernize the Commission’s impact assessment guidelines, which were soft on cost–benefit tools compared with OECD best practices (European Commission, 2005c; Hahn and Litan, 2005);



- a plan to ensure that all amendments to Commission proposals added by the European Parliament and Council were subject to impact assessment (European Union, 2005c); and
- a pilot study to disclose the administrative costs (called “red tape” in the USA) of EC regulation using a novel methodology pioneered by the Netherlands.

I wanted to be elated about these developments, but I am always a bit skeptical when politicians try to turn good government initiatives into press releases. I scrutinized the package carefully with an eye to the jugular issue of accountability.

The fine print of the plan offered little reassurance, as no OIRA-like office was created and it was not clear how Barroso and Verheugen would ensure faithful implementation (Alemanno, 2009). From Brussels, the informal word was that a small team of sharp analysts in DG Enterprise would serve as Verheugen’s eyes and ears, and would have the *de facto* power to review any impact assessment in the Commission prior to a vote by the Commission.

This concept worried me, since it sounded as if a team of analysts in the US Department of Commerce was being given powers over the other Cabinet agencies, to use an inapt analogy to the US federal government. If the good-government nature of better regulation was distorted into a pro-business political campaign, the likelihood of sustained progress was minimal.

Within a few months, news stories surfaced that Verheugen’s team was setting high analytic standards for new legislative proposals. Officials in DG SANCO and DG Environment were quite worried. A confrontation on clean air legislation between Verheugen and DG Environment in mid-2005 was leaked to the European press (Buck and Minder, 2005). I later learned that the substance of the dispute was quite similar to disputes that I had with EPA in 2002–3 over how to measure the benefits and costs of stricter air quality regulations.

Certainly, there was much good news in the Barroso plan. Political leadership of better regulation was no longer missing. Impact assessments were now required and would be reviewed for quality under explicit guidelines. Economics was being given more emphasis in the impact assessment process.

In my own mind, though, I questioned the wisdom of trying to house the better regulation program under the Commissioner of Industry and Enterprise. I thought that the Secretary General’s Office was a better long-run home for the EC’s better regulation unit. The counterargument

was that Verheugen was not just any Commissioner. He was also a Vice President of the Commission. In 1981, President Ronald Reagan had issued an executive order that gave OIRA power under the supervision of another Vice President, George Herbert Walker Bush, who later became President and gave regulatory oversight authority to his Vice President, Dan Quayle.

Verheugen was not bashful. He quickly sent public signals that he was willing to override the wishes of civil servants who were not respectful of the new “jobs and prosperity” agenda. Skeptics argued that he was more pro-business than he was pro-analysis. In the context of European or American politics, this “industry and enterprise” branding of better regulation did not seem to be wise or sustainable (Lofstedt, 2007). Yet this was the state of affairs when I left the Bush administration in March 2006 to become Dean of the Pardee RAND Graduate School of Policy Analysis in Santa Monica, California.

One of my last acts as OIRA Administrator in early 2006 was a visit to Brussels to support President Bush’s EU–US Economic Initiative. We were working on a mutual “early warning system” on regulation, aimed at giving political leaders on both sides of the Atlantic a “heads up” about new regulatory proposals that were likely to be moving forward. I noticed, during this trip, that my European colleagues were beginning to recognize that both the US Congress and the presidency were important sources of new regulatory initiatives. At the closing session, I praised the better regulation reformers in the Commission for their pathbreaking work. It was amazing how much the Commission’s process had changed since 2001.

## **Was it an OIRA?**

At the end of 2006, I was pleased and intrigued to learn of a new development in Brussels. The Barroso Commission established in the Secretary General’s Office a new unit called the Impact Assessment Board (IAB). It was not exactly an OIRA-like organization, but it had some similar functions to OIRA.

IAB was formed as a central quality control unit for impact assessment within the EC. Replacing the ad hoc unit in DG Enterprise, IAB’s function is to review draft RIAs from the various units of the Commission and offer opinions as to their quality, including suggestions for improvement. The opinions are not binding but are published after the Commission releases a final proposal for consideration by the Parliament and Council.

Interestingly, IAB is designed to be independent of the policymaking departments in the Commission. Instead of building its own senior staff, the Commission relies on high-level career officials from three domains of the Commission's work – economy, society, and environment – to perform the reviews. Unlike OIRA, IAB was granted no policymaking power but it was awarded a key power: a legislative proposal is not permitted to proceed for a vote by the Commissioners until the IAB's review is complete.

It is too early to judge the performance of the IAB, but I think the accountability challenge is not fully resolved. Some scholars believe the Commission's impact assessment obligations may need to be subject to judicial review in order to ensure that impact assessment is of high quality and is utilized by policymakers (Alemanno, 2009).

If that IAB innovation was not enough, I learned that in 2008 my OIRA colleagues had taken our regulatory cooperation initiative to a new level. A document jointly authored by OIRA and the Secretary General's Office called for guidelines on how better regulations could be written to minimize adverse trade impacts (OMB/SG, 2008). And both sides of the Atlantic vowed to amend their guidelines accordingly! To the best of my knowledge, OIRA had never before collaborated with the EC/EU on this kind of official document.

One of the great fears of political officials in the US Executive Office of the President is that much of their hard work will be dropped when a new President takes office. I am pleased to report that this did not happen when President Barack Obama succeeded George W. Bush in 2009 (Sunstein, 2013). Dialogue about better regulation has now become regulated, especially dialogue between the Secretary General's Office and OIRA. Most recently, President Obama joined with European leaders in an effort to establish a bilateral free trade agreement between the European Union and the United States. Regulatory cooperation is one of the important strategies on the table in this activity.

## **Conclusion**

One of the fundamental challenges in public administration is to foster cooperation between public servants in different countries. Globalization of the world economy has only underscored the powerful case for regulatory cooperation. Since the regulatory policies of Europe and the United States have powerful influence around the world, cooperation between the EU and the United States is particularly crucial.

Unfortunately, as I have documented in this chapter, the structures of the European Union and the US government do not make it easy to

engage in meaningful regulatory cooperation. The United States cannot speak with a single voice with Europe because the US Congress and the executive branch develop regulations through a complex process with multiple power centers. OIRA is a modest effort to bring some coherence and analytic discipline to the US regulatory process, but it is only beginning to see its role more broadly as a force in regulatory cooperation between the United States and the EU.

Nor does the European Union speak with a single voice on the subject of regulation. The EC has the exclusive right to initiate new legislation, but the European Parliament and Council are increasing their influence in the EU regulatory process. Inside the EC, the Secretary General's Office has some modest authority, but each of the Commissioners has formal voting rights and the Commission operates more like a legislative body than as an executive operation.

Given the complexity of the EU and US political systems, it should not be surprising that it is not easy to accomplish regulatory cooperation. That does not mean that efforts should not be made, and I remain optimistic (despite ample reasons for pessimism such as lawsuits in the World Trade Organization). I believe we will eventually have a modernized system where public servants in the United States and EU collaborate on common impact assessments of regulatory programs. Progress will come slowly, but I think citizens and businesses on both sides of the Atlantic will demand that EU and US regulators learn how to collaborate with each other.

# 3

## What We Seem to Forget in Modern Public Administration

*Arthur B. Ringeling*

### Introduction

Modern Public Administration seems to have lost insights that are crucial for the discipline. This is a result of the dominance of the Anglo-Saxon, or perhaps more accurately American, model of Public Administration, with its emphasis on management and economics. The attention given to law and politics has correspondingly diminished. These phenomena are now typically considered as factors external to the subject matter. No longer is the democratic *Rechtsstaat* considered as a crucial object of study for current Public Administration research or for the way the field developed. Public Administration has become a technical discipline, all but abstaining from values other than those of effectiveness and efficiency that now govern public affairs.

Too much Public Administration has become a discipline of management, of costs and benefits, and of effective and efficient implementation. Meanwhile, a number of crucial insights get too little attention. What we seem to forget are problems about the functionality of the state, about constitutional questions, and about legality and justice. We often take the significance of law for granted, and there is hardly any effort to study its importance for the everyday action of government. Law is considered as an instrument comparable to all others. At best, law is a kind of vague constraint, something that has to be taken into account when we design our policy and organizational strategies but without much real consequences. We seldom ask the question whether certain policies are allowed according to the law. At the same time, there is a strong tendency in the field to consider law as something that we have to get rid of, a deification of deregulation, the abolishment of red tape and bureaucracy. Terry (2006, p. 119) says that advocates of this

so-called liberation management '[...] fail to recognize the important role that rules and regulations play in strengthening the integrity of administrative institutions'.

Public Administration has become vulnerable because of this misconception. It has proven itself unable to make clear what the importance of the legality principle is. There is every reason, however, to once again illuminate the concept of law in a Public Administration context. Perhaps this runs counter to those who have stated that public administration has to be business-like and that governments have to be run as a business. It may be out of line with the tenets of New Public Management. But the (re-)inclusion of law can possibly contribute to a more balanced view of Public Administration. Additionally, it may have important consequences for the discipline of Public Administration. I would like to propose here that the concept of the democratic *Rechtsstaat* highlights the importance of law in a public context, and that law has to be studied as a core concept if the discipline wants to have any relevance for practice. Public Administration is about governing processes in the context of a democratic *Rechtsstaat*. It is not an organizational science for the public sector without any relationship to the cultural and political context. It is a broad field of study that recognizes the conflict of values in the public realm and tries in a balanced way to cope with them.

## Relationships between law and administration

Snellen (1989) drew attention to, what he called, domain conflicts between policy and law. He distinguishes seven different perspectives concerning that conflict.

First, some authors hold that public policy is the formation and construction of public law. Between the two phenomena exists an intensive relationship. Policy formation is, in principle, the formation of law. Policy means the execution of power by the state. In a *Rechtsstaat*, this implies the effectuation of the law: 'Administrative law should not – as in the liberal conception of the state – be considered as a safeguard against governmental intervention, but as standardization of the execution of public tasks' (Hirsch Ballin, 1979, p. 250). There is no aspect of governmental policy, irrespective of the phase of policy development, or an activity of government that can be separated from the judgment of the law.

In the perspectives that follow, the freedom of policymakers with regard to the law progressively increases. According to the second perspective,

law sets the preconditions in which government can develop its activities. Thus, government policy can be developed within the space the law offers. This perspective comes close to most definitions of the legality principle.

The third perspective shares a characteristic with the second: law is a framework for public policy. Nonetheless, the administration has its own discretion in implementing the law. That discretion can be, and in the eyes of some has to be (see Davis, 1971), limited by formulating policy rules.

The fourth perspective is that public policy, when consistent, is a basis for the development of law. Law changes as a result of policy formation. However, this position rejects the instrumental view of law, in which the rules can be changed as a result of changing policy insights. There are principles of law and fair administration that have to be taken into account in developing new policies and in implementing existing ones. The limits on the process of rule formulation have to be considered. In order to know what good governance is, general principles have to be formulated to serve as guidelines.

The fifth perspective sees public policy as a condition for the realization of law. Snellen refers in particular to the problem of upholding the law. What is maintained and what not is a question of priorities. One hundred per cent maintenance, whatever administrators may claim, is an illusion. Prioritization is part of the process of policy formulation – of politics. Yet most of the times, it is the result of decisions made by implementing organizations or individual public officials.

The sixth perspective takes the position that the policymaker has the possibility to choose between policy and law. It is a question of either/or. In this view, law becomes an instrument that can be chosen or not.

According to the seventh perspective, the law is nothing more than an instrument for public policy, and comparable to financial or organizational instruments. This last perspective has been especially vehemently debated, for instance, by authors such as Tamanaha (2006).

Not only is there a variety of perspectives on this question, but they also change over time. The belief in the instrumental character of law held by public policymakers and students of public policy resulted in great creativity in government measures. That remained, however, not without consequences. Law people tried to, what is called, “juridify” these measures: they made a law of informal policy rules. They gave policy decisions such as implementation priorities, policy rules, and covenanting a judicial position. That is not a reproach; it is, after all, their task to offer an adequate framework for public decisions.

The relationship between policy and law is more complicated than the question “Is it permitted according to the law?” There are a number of domain conflicts between public policy and law. From these conflicts, we can learn that the domain conflicts arise not only when or even before we formulate policies but also during the whole policy process. Students of Public Administration or Public Management cannot act like these problems do not exist or state that they are not interested in these problems. The task of law people is not limited to laying down in rules the policy that policymakers designed. There is not only what Snellen (1987) has called a specific rationality of law, just as there is an economic or political rationality, but also a specific logic and specific values. And legality is not a minor value to be traded off against any other one.

### **Instrumentalism?**

It is possible to develop four different perspectives on public administration (cf. Hemerijck, 2003). One dimension is based on the distinction that Scharpf (1997) made between the logic of consequence and the logic of appropriateness. The other dimension refers to whether an action or a valuating perspective is applied. This results in four different kinds of questions regarding solutions for problems in public administration (see Figure 3.1):

1. In terms of effectiveness: does it work?
2. In terms of feasibility: does it fit?
3. In terms of acceptability: is it normatively correct?
4. In terms of legality: is it permitted?

The four questions given above represent four different perspectives on Public Administration. In the development of the discipline, the question of effectiveness has become the dominant one. It fits perfectly into the pragmatic way of thinking and reasoning that is represented by the American model. Herein, economists tried to calculate which measures were the most effective and efficient. Later, the context in which instruments were applied came to be seen as more and more important. When another perspective was taken, it was usually the feasibility question, in particular the question of political feasibility (see Meltsner, 1976). The acceptability or legitimacy questions were subjects that inspired political philosophers. But such normative questions have seen hard times during the reign of supremacy of empirical approaches



<div style="text-align: center;"> <b>Perspective</b>  <b>Logic</b> </div>		
	<b>Action perspective</b>	<b>Valuation perspective</b>
<b>Logic of consequence</b>	Pragmatic Effectiveness Does it work?	Legal tradition Legality Is it permitted?
<b>Logic of appropriateness</b>	Political-administrative setting Feasibility Does it fit?	Political ideology Acceptability Is it normatively correct?

*Figure 3.1* Four key questions

*Source:* Hemerijck (2003).

in public administration. However, political and societal philosophy experienced a resurrection in the final decades of the last century. With this, the importance of normative questions has risen as well (cf. Fischer and Forester, 1993). The question of legality of public policy is perhaps one of the oldest questions about public policy and administrative measures. For the legality question, however, mostly an instrumental perspective has been applied. If certain proposals were not allowed, then the rules had to be changed. The distinction we made between four different perspectives on policy and administration can be specified as the pragmatic, political, philosophical, and juridical approaches.

It must be made clear that a number of authors oppose the view of law as a contingent factor or, even worse, as merely an instrument. The law is not an optimizing problem (cf. Zouridis, 2009). The importance of the legality principle can '[...] impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable' (see Rosenbloom, 2006, p. 101). In part, this is inevitable; in part, it is intended. The

separation of powers is not there to make the exercise of power easier. The question is not how to make government more efficient by means of the rule of law. It is dubious whether we can even speak about the efficient implementation of a law. The law is a complicated and expensive phenomenon, full of contradictions. It gives those in power the facility to rule, but at the same time it gives other actors the possibility to oppose those in power. Law is the way in which public ideals are realized, as well as prevented. Who has eyes only for effectiveness and efficiency has no idea what the state is meant for.

One must conclude that to consider the law as an instrument is a very one-sided perspective (Ringeling, 2005). One who complains about the lack of effectiveness of public rules overlooks a number of other considerations for formulating such rules. Other perspectives are justified and necessary, because a rule is not a rule justified by reference to itself or because the rule-giver decided upon it. A public policy is not legitimized merely because a representative body is in favor of it or because an administrative decision has been made, even if this is contrary to popular perception. So a law in itself is not a legitimation for the actions of public authorities. The relationship is much more complicated. Behind laws are normative ideas, and laws have to be in accordance with these. Choosing law as an instrument implies choosing also a whole world connected to it. Not only is the rule at stake, but many other phenomena also come with it: procedures, appeals, layers, as well as a lot of more fundamental ideas about justice, the rule of law, and the democratic *Rechtsstaat*. This last concept, in particular, requires much more elaboration, to which we now turn.

### **The democratic *Rechtsstaat***

Legality should not be considered as merely a toy for law people. Even if this is true to some extent, such a view is shortsighted. Legality is fundamental for our kind of political-administrative system. Legality and the democratic *Rechtsstaat* have a close relationship; more about the latter is given in the following.

The *Rechtsstaat* is grounded in the idea that the state is bound by laws and rules (Witteveen, 2000, p. 203). That idea forms a kind of normative horizon within which meaningful political and juridical actions are possible. The *Rechtsstaat* is a construction, perhaps to some an ideological construction, but a construction nevertheless. The *Rechtsstaat* is considered to be a democratic construction. Legality refers to rule-giving, and rules do not come into being without the cooperation of representative

bodies. The rule of law is at the heart of the organization of the modern state. To an important extent, it determines the actions of government officials and citizens.

Key concepts connected to the democratic *Rechtsstaat* are, according to Witteveen: representation, public interest, responsibility, separation of powers and checks and balances, citizenship, public morality, responsiveness, and mediation between public organizations and citizens. Some authors added to this already impressive list fundamental rights and the protection of minorities. Thus, the concept is not without consequences for the governance of the state. The executive power gets no more power than necessary for the execution of laws, and sometimes even less. This enumeration makes it clear that the democratic *Rechtsstaat* is a concept with formal as well as material aspects.

Inherent in the concept of the *Rechtsstaat* are three principles: democracy, the liberal *Rechtsstaat*, and the social *Rechtsstaat* (cf. Zijlstra, 1997). The democracy principle guarantees citizens influence on what government does. The principle of the liberal *Rechtsstaat* puts borders in place that set the boundaries of what governments may or may not do. It guards against infringement of individual freedom and guarantees legality and legal security. The social *Rechtsstaat* is a principle dealing with what the state must do: to guarantee the conditions required for its citizens to have a decent life.

## Democracy

The democratic principles establish that public decisions have to be made by democratic public authorities, more precisely by representative public decision makers. They not only set the rules of the state but also appoint its administrators. They control what the administrators do, guard the openness of public decision making, and organize possibilities for citizens to react to policy proposals. Some authors would add decentralization as a democratic value, reasoning that decisions should be made as close as possible to the citizens concerned. This principle brings with it political rights, implying the possibilities to act as a political citizen.

Yet there are tensions between democracy and the *Rechtsstaat* (cf. Pessers, 2011). A public decision is not made just simply by being put into law. Nor is the law just in itself. It has to be tested. It is just when it fits in the *Rechtsstaat*. Here one can see a difference with the idea of rule of law, as the rule of law does not require this test. Additionally, the *Rechtsstaat* is a long-term project, while democracies are populated by participants with much shorter time spans.

So, we have to keep in mind that it is the combination of the two, democracy and the *Rechtsstaat*, that is important. Democracy alone is not enough and the idea of majority rule is even less. Nor is the *Rechtsstaat* alone sufficient. It is the combination of the two institutions. Democracy alone leads to majority voting and the suppression of minorities. Without democracy, the *Rechtsstaat* may become a dictatorship by means of the law. And bureaucracies run the risk to become the centers of tyranny, as Arendt (1958) stipulates.

## Elements

The values of the democratic *Rechtsstaat* consist of the legality principle (rule of law), the separation of powers, judicial control, and individual basic rights.

First, there is the rule of law. This means a government based on rules, on what we call the law. The law here is not something invented by a political leader or societal entities trying to maximize their self-interest. Rather, the law is, in principle, the result of a democratic decision-making process. What some people call formalism, and others bureaucracy, leads to predictability and reliability of public organizations.

The second value of the *Rechtsstaat* is the separation of powers, because state power can be a brutal power. Power corrupts and absolute power corrupts absolutely, as the old political science wisdom goes. Thus, the state was made less powerful by splitting it according to different functions. Moreover, checks and balances were invented in order to ensure that each power could not go its own way. Yet despite this – far from clear – institutional separation, in a lot of European countries the rulemaking and executive powers have gradually become more connected to each other. The executive increasingly makes rules itself, called directives, policy rules, or priorities. The representative bodies have been increasingly inclined to answer not only the “what” but also the “how” question, and to intervene in the executive’s work. From a constitutional point of view, these developments are highly important.

Third, connected to the *Rechtsstaat* is the protection of citizens by the law and the ability of both national and international courts to make independent judgments on cases in this matter. Judicial control by independent courts is a crucial characteristic of this type of state. Especially given the aforementioned developments, such courts have increasingly become the only really separated power.

These, then, are the relatively easy values. Yet behind them is a much more fundamental idea: the ability to cope with diversity, the same idea as is behind the procedural republic. We have different values about life,

the world, and politics; the central task for the state is how to cope with these differing values held by different persons.

Thus, fourth, and perhaps most important of all (cf. Pessers, 2011), the democratic *Rechtsstaat* brought us the idea of fundamental, universal rights that could be claimed by individual citizens as a recognition of their liberty and their position in the public realm. Political rights were the first to appear, intended to keep the state at a distance and assign responsibilities to public positions. Soon after, social rights were formulated in an attempt to contribute directly to justice in society and to make society more just.

Together, these elements constitute the basis for the activities of public organizations: *together*, not one of these elements alone. Legalism without judicial control brings us the dictatorial state, as does the lack of individual human rights or the concentration of public power in one hand.

The principle of the liberal *Rechtsstaat* is intended to prevent totalitarianism and the arbitrary exercise and abuse of power. It makes “the King” small. In order to do so, elements such as the legality of administration, the separation of power, judicial control, and liberal fundamental rights are involved. Acts of government have to be based on rational defensible rules that can be followed by any involved citizens. The principle of the liberal *Rechtsstaat* seeks to prevent too much power coming into one hand. Thus, different state activities are identified that should be performed by different authorities. In a number of interpretations of the liberal principle, the idea of “checks and balances” is introduced: the different state authorities need each other in order to be able to perform their tasks. This system implies the organization of power and contrapower. One of these powers is the judicial one: courts should have the possibilities to judge acts of government and the power to compel others to respect its judgment, up to and including nullification. The liberal fundamental rights guard the rights and freedom of citizens and make clear that there is a “state-free” domain where citizens should not be bothered.

A more recent development is the principle of the social *Rechtsstaat*. This principle formulated the ideal of citizens being able to live in a meaningful way. In this principle, the idea of social justice is central. Thus, the reasoning behind this principle can also be found in the work of Frederickson (1997) about social equity as a central value for government. However, in this principle, ideas can also be found about the effective and efficient operation of the state. Governments should be interested in what their actions cause in society and in the ways they perform their tasks.

## A central concept

An overview like that provided earlier makes clear how much is at stake when we use the democratic *Rechtsstaat* as a central concept. It also reveals how much has changed during the last century: basic political and social rights, governmental openness, big steps in the protection of citizens against governments' decisions, new courts, and nationally and internationally protected rights. Principles such as good administration, good governance, transparency, accountability, and responsibility are the expression of the values with which this concept is connected. The best indicator of the success of these developments is the numerous complaints of national and local administrators against all this protection by the law, as well as the complaints of politicians that they no longer have leeway for making their own decisions, that their hands are tied by international and national institutions.

The four elements discussed in the previous section are united by the idea of a public sphere that respects its citizens. All four are needed; one element cannot be reduced to another. What is more, one element is also not superior to any other. The crucial insight is that to some extent they even conflict with each other. Considerations have to be made about the tensions between the three elements, the different weights they should have in specific situations, and how aspects can possibly be harmonized. This makes the idea of the democratic *Rechtsstaat* vulnerable in practice, as is clear when we look at the values that are derived from these principles. This also makes clear that the concept does not offer us fixed answers. Both the results of democratic processes and the results of intensive reasoning (see Majone, 1989) deliver valuable insights.

Values are central to what governments do, as Easton (1971) made clear. His famous expression is that the function of the state is to authoritatively allocate values in a society. Values are also central in the line of thought of the democratic *Rechtsstaat*. The state is about values, public values to be more precise (see also Moore, 1995).

The point of departure of that reasoning is that the state has to cope with diversity in society. We all are different; we think differently; we have different insights and convictions about what is and what should be in society. The central question is how we can live with one another without having fights all over. While this is a step from Hobbes' war of all against all, his view that an authoritarian regime would be acceptable to prevent such a war may resonate also in our case. However, the concept of the democratic *Rechtsstaat* puts such a solution out of the

range of acceptability. Given such a regime, there is a need to reconcile the differences of opinions in one way or another.

An argument against the idea of reconciliation of differences is that we have a system of representative government. In such a system, the winner takes the post. There is nothing to reconcile: in elections you win or lose. When you lose, it is a pity, maybe better luck next time. While this reasoning may give an adequate picture of what is happening on a daily basis, in existing democracies it is contradicted by three insights.

The first one is that this picture is only adequate – more or less – for two-party systems. In countries where governments are formed through coalitions, the picture is less clear. This is because when there is no majority party, which is the situation in most Western European countries, reconciliation between a number of parties is a necessity. The second insight is that majorities are not self-evident. They are constructions of groups that found each other in one of numerous possible ways. Society consists of various, possibly innumerable, minorities. These minorities try to find (and find out about) each other in order to form a majority, although a process of give and take is inherent in this process of majority formation. The third insight is, according to Scharpf (1970), that the fundamental question in a democracy is, regardless, how to cope with the minority or minorities. A minority that stays a minority forever is isolated from the discussion about the values to be allocated. This raises the possibility that such an isolated minority develops into a threat to the kind of life a democracy is directed toward.

We can conclude that those in power are not always or automatically allowed to do what they want or what they think is desirable. Moreover, many of the alternatives for handling issues and governing are simply not allowed. The reason is not because the law forbids some approaches or that they do not have permissive rules at their disposal that allows them to follow certain routes. Rather, it is because it conflicts with more fundamental ideas about law, legality, and the way the state is organized as well as the fundamental principles on which the organization rests. The democratic *Rechtsstaat* can be considered as a central concept in our field, and a key concept for Public Administration.

## Value-sensitive Public Administration

We have discovered at least three additional insights in previous paragraphs. First, there are different doctrines in Public Administration. Each has its own set of values, and each has to be studied with these

in mind. They should be studied with particular regard to their relationship with the democratic and juridical basis of the state. Doing so will make us aware of the tensions between values promoted by the democratic *Rechtsstaat* and these doctrines.

Second, in the field of Public Administration, more attention has to be given to problems that have to do with the rule of law, with legal processes, and, even more important, with the legal character of government. We can phrase that also in another way by saying that elements of the Continental tradition have a place in the discipline. This tradition enables us to study the state as a state, not a kind of crippled business, not as a stand-in for when the market fails. Neither is the state the place for optimizing individual gain. The Continental tradition offers us the possibility to give attention to value as well as to democratic issues. These issues are of fundamental significance for the practice of public administration. Public Administration without knowledge of the juridical character of the state, of how regulation works and what its functions are, is an incomplete study. Reincorporating the Continental tradition of Public Administration should prevent us from developing doctrines about public organization that conflict with the values of the democratic *Rechtsstaat*.

Third, by paying attention to the Continental tradition, there will also be opportunities to study issues that are related to the phenomenon of diversity. It is not a new insight that citizens hold different values. We differ in a lot of aspects in our thinking about government and governing. Respect for this fact was one of the reasons for the development of pragmatic thinking. Yet in Public Administration that diversity seems to have been replaced by an almost universal schematic derived from economic neoliberalism. Whether there will be one scheme in the future is not only dubious but also dangerous. The *Rechtsstaat* offers the opportunity to cope with diversity of values in society and in the political realm, while also being connected to ideas about universal rights and democratic processes.

The democratic *Rechtsstaat* organizes societal and political diversity in two ways: through the rule of law and through participation of its citizens. The rule of law offers citizens fundamental rights. Citizens have the opportunity to organize themselves free of state interference. The power of the state is limited by these rights, by the rule of law, and by independent judicial review. This is a great political achievement, however imperfect everyday practice may be. There are still too many countries struggling to reach such a state.

Yet the significance of the democratic *Rechtsstaat* also has its limits. It offers useful, but partial answers to the big and divisive problems



concerning the public sphere. There are those enduring questions that have been oft discussed and will continue to be discussed in the future, questions such as the relationship and linkages between state and society, between public and private, between democratic and bureaucratic governance, between politics and administration, between central government and decentralized government, and between efficiency and other values. To all these questions we may have answers, but the answers differ from citizen to citizen and over time. Most of the answers we formulate are only temporary ones.

### **What we should not forget**

A juridical view on public administration is one that is not only worthwhile but also necessary. Such a view is essential for a decent society. Not that this perspective is without debate. There are a lot of tensions in the concept of law and in its application. Yet even here, legal reasoning is a way to organize that debate, and to organize it in a better way than do the struggle of all against all or the blind forces of the market. Law and its foundation in the democratic *Rechtsstaat* constitute a way to cope with diversity in society. The tensions are present from the moment we start formulating rules up to the moment that they are enforced. Law is a contested affair. Yet it is a better alternative than brute force, blind forces, dominant market parties, priorities of rulers, or opportunities of implementers. Laws serve as protection for the members of society, in particular for those who run the greatest chance of losing that protection.

The Continental tradition of Public Administration stresses some points that have received too little attention during the development of modern Public Administration. If we agree that state activities are permitted not only when the market fails but also on other occasions, what then is the justification for them? If we agree that the state is not limited to fulfilling only economic functions, why then is the state there? Is it a justification of every state or only states of the Western type, democratic states, that build on the rule of law, given how contrary these terms are already in themselves?

In the United States, a new kind of Public Administration was successfully built up during the last century. The Continental tradition was to a large extent replaced by modern Public Administration. With that transition, important insights seem to have been forgotten: insights about the state, about what states are meant for, and about the values that are connected to them. There has been relatively little attention given

to the phenomenon of law and its significance for governing processes in modern Public Administration. The heritage of Wilson, modernized by authors such as Waldo (1948) and Stillman (1991), lost its influence in the gulf of management thinking and management schools that flooded modern Public Administration.

Not only attention for the phenomenon of law but also interest in more philosophical questions has disappeared to an important extent. Political philosophy had been dead for a long time until it experienced a kind of rebirth in the 1970s. Yet in the following decades, Public Administration kept too much distance from an area of knowledge that is crucial for its further development. Management and optimizing policies are important themes, but these themes are embedded in philosophical questions about the role of the state, citizenship, and questions of justice and fairness.

Yet the Continental approach ran the risk of becoming something like a relic from the past. It is questionable whether it has renewed itself enough. With modern Public Administration gaining more and more attention, the discussion within the traditional Continental approach became more and more a discussion about law, in particular administrative law. The approach became a more and more specialized arena for law people. It could have offered so much more than it did, but it cloistered itself in its own organization and arena. More and more, it became self-referential, losing interaction with the Public Administration community.

Yet Public Administration is not an organizational science for the public sector without any relationship to the cultural and political context. It is about governing processes in the context of a democratic *Rechtsstaat*. Public Administration is a broad field of study that recognizes the conflict of values in the public realm. Perhaps we should once again and more often address problems of what could be called a constitutional and collective level, about the structure of the state, about how the structure is developing, and about the values that are central for that state and how they can be protected. Answering these questions is not a goal in itself or for strengthening the state only. The task of Public Administration is also to contribute to the protection of citizens who are confronted with the power of the state. This has consequences for our Public Administration programs. Beckett (2010, p. 183) correctly remarks:

Public managers should understand the principles of public law, the constitutional framework and doctrines as they implement

legislative policy and respect judicial decisions [...] Public managers must act within the bounds of legality and respect the constitutional rights of individuals.

The analysis of the values of doctrines in Public Administration shows that a discussion about public values should be at the heart of the discipline. Political philosophy has to be part of the curricula. More attention to normative and political-philosophical questions is fundamental for the field we study and a necessity for Public Administration.

For these reasons, we have to broaden the scope of Public Administration once again. It has to encompass more than managerial problems; it has to be more than a technical discipline devoted to the quest for optimizing public solutions. It is not the orientation of getting things done that matters most, but of checks and balances, of organizing power and counterpower, and of – in a way – slowing things down and even not getting them done. We have to also make clear that public rules are not there at the discretion of the rulers, and that they are not formulated after a policy has been designed. In evaluating public policy, we have to apply more standards than just effectiveness and efficiency. Moral judgment in the implementation of policies, due process, and citizen involvement in public policy are also objects for study. We have to scrutinize to what extent policies are in accordance with the law, with the principles of law, and with a democratic culture in general. Public Administration has to play an important role in the reproduction of the democratic *Rechtsstaat*, in the research we do, and in the lectures we teach.

# **Part II**

## **Protecting State**

# 4

## Reconciling Inconsistencies in Regulation throughout the European Union for a Risk-based Approach toward Industry Governance: A Closer Look at Germany

*Sweta Chakraborty and Naomi Creutzfeldt*

### Introduction

Protecting citizens from harm to life and property is the oldest and primary function of the state. Apart from war and terrorism, there are many sources of harmful effects in the everyday life of citizens, arising, for instance, from modern technologies and globalization. Traditionally, governments have sought to prevent serious risks altogether regardless of their probability of occurrence. A case in point is the deterministic safety philosophy for nuclear reactors that requires prevention of a meltdown on the basis of predefined accidents rather than probability assessments. However, high prevention costs and unintended negative effects of preventive measures due to complex causal relationships have led to the gradual replacement of a hazard-based approach with a risk-based approach, which takes the probability of harmful events into account. Thus, the hazard-based protecting state seems to be shifting toward a risk-based protecting state. This is apparent in the field of product safety.

### Risk versus hazard – an overview

There exists an alleged inconsistency in the classification of products and activities as risks versus hazards across the European Union (EU) (Chakraborty, 2012). Classification as a risk as opposed to as a hazard has several implications for regulation, particularly across borders

when the same product or activity is labeled as a risk in one country, but as a hazard in another. This inconsistent classification has resulted in a debate as to whether regulations should be based on a hazard or risk assessment, and how such a regulatory approach may be applied consistently across the EU.

The purpose of this chapter is to critically analyze arguments from both sides of the *risk versus hazard* debate in order to justify either a hazard or a risk assessment approach moving forward, one that may be consistently applied across the EU. Consistent application may prove challenging due to existing variations in governance norms across countries that are entrenched in cultural and historical contexts. European-wide harmonization of risk- or hazard-based regulation requires consideration of the unique social contexts that characterize the individual Member States. These contexts contribute to public perceptions of risk and expectations of accountability by the government and other relevant stakeholders and can be better understood through careful analysis of each individual Member State for the purpose of determining how and to what extent each state might contribute to European-wide harmonization.

This chapter will take a closer look at Germany. It will provide an introductory trawl into the national regulatory landscape, which is characterized by a juridified culture that also exhibits an aversion to risk. It will then discuss how such characterizations have been seemingly reconciled toward the European-wide effort in moving to a risk-based approach in regulation – particularly in regards to the food and pharmaceutical industries. Understanding the food and pharmaceutical regulatory landscape in Germany contributes vital information for the harmonization of risk regulation in the EU. The case will be made that a risk-based approach is the best regulatory approach moving forward and can be promoted successfully by sector, as has been the case with food and pharmaceuticals, even in risk-averse countries (for example, Germany) once the nation-specific regulatory landscape is better understood.

## **The risk versus hazard debate**

Following scares to public health (for example, thalidomide), the EU has put in place sophisticated regulatory systems designed to enforce safety standards for the purpose of protecting its citizens. However, the formation of environmental and health and safety regulatory agencies since the early 1970s has also resulted in a growing debate about how best

to regulate substances (for example, chemical molecular entities, food additives, and preservatives) as a risk or as a hazard. The key component of this debate is whether regulatory decision making can and should be based on hazard classification alone, foregoing risk assessment. Risk assessments have been understood by experts since the 1950s as a useful tool to predict failures, and thus an important regulatory tool for the basis of health, environmental hazards, and so on (Decker, 2011). However, risk assessments appear to be underutilized in specific EU Member States and regulated industries, which prefer only hazard classifications.

From an economic perspective, decision making on the basis of hazard classification alone usually ignores impact assessment – or the process that prepares evidence for policymakers on the advantages and disadvantages of possible policy options by assessing their potential impact,<sup>1</sup> and in doing so, often contributes to poor regulatory policymaking (Löfstedt, 2011a). The burden falls on the innovator to show safety and no risk – a very difficult standard to meet for any innovation (Chakraborty and Caplan, 2013). This raises the question as to why strictly hazard-based classifications are still being made, and the extent to which confusion between the terms *risk* and *hazard* may play a role.

### Defining “risk” and “hazard”

In order to understand the nuances of this debate, it is necessary to make the technical distinction between the terms *risk* and *hazard*. A hazard classification refers to the inherent potential for a substance to cause harm, while a risk assessment refers to the combination of the likelihood and the severity of a substance to cause harm (United Kingdom. Health and Safety Executive, 2013). Despite this clear distinction in regards to how a substance or activity may be approached in terms of regulation, it is evident that confusion still exists among policymakers regarding the meaning of the two terms. Distinction between risk and hazard is particularly ambiguous outside the United States (where the majority of empirical risk and hazard research is conducted). The implication for this confusion for Europe, in particular, is the potential intentional or unintentional misappropriation of the terms in regards to product classification and subsequent regulation (Löfstedt, 2011a).

### Policy challenges

Confusion between the terms risk and hazard can lead to arbitrary decisions between hazard classifications and risk assessments for a substance. The implication for this in Europe is inconsistent regulations

across Member States and regulatory bodies. For example, the European food regulatory bodies favor the use of risk assessments, while other sectors prefer hazard classifications. A hazard-based approach is also popular among many Western European states (for example, France) where the ultimate outcome often results in absolute hazard avoidance with outright bans of a product, technology, or activity (Löfstedt, 2011b). Meanwhile, the United Kingdom as a nation embraces a more risk-based approach (Löfstedt, 2011b), which seeks risk minimization but tolerates some levels of risk as acceptable in order to gain benefits. In addition to these cultural preferences, it is alleged that Member States in the EU may arbitrarily choose risk versus hazard classifications of products when it is politically suitable (Bench, 2011).

The primary question arising from this debate is how to prevent confusion between what is meant by *risk* and *hazard* and to ensure that the regulations coming out of the EU are not made based on arbitrary hazard or risk classifications, but rather as a result of an evidence-based approach. In order to address these questions, one must consider how Europeans regulate risks. Why do nations and/or regulated industries prefer hazard classifications over risk assessments? What are the differences in risk versus hazard classification across borders and regulatory sectors? These questions may be addressed by examining each Member State in turn.

This chapter aims specifically to examine the regulatory approaches taken in Germany across the chosen sectors of food and pharmaceuticals. It examines how the risk is regulated and whether or not decisions are made from risk versus hazard approaches. Case examples (specially, bovine spongiform encephalopathy [BSE] and Actos, a drug for the treatment of type 2 diabetes) within the chosen industries and the industries themselves help to describe Germany's regulatory landscape in relation to how EU legislation is interpreted and implemented, and subsequently how such decisions can help to inform the risk versus hazard debate.

## Germany

### Germany's position in the European Union

Germany was one of the founding members of the European Community in 1957, which became the EU in 1993. Germany, together with France, continues to have a position of authority in the EU, which is made up of 28 countries today. Since 1949, the Federal Republic of Germany has been a parliamentary federal democracy. After unification in 1989,



Germany consists of 16 federal states (*Länder*). Each of these states has its own constitution, government, parliament, administrative structures, and courts. Germany has a long tradition of a “legal state” (*Rechtsstaat*) and cooperative federalism. The German government is divided into three levels: federal, *Land*, and local (Héritier *et al.*, 1994).

Reflecting the federal nature of the German state, Germany's regulatory production system is complex (Héritier *et al.*, 1994). Regulations are produced at the federal level; these laws are then usually fleshed out in secondary regulations produced by the federal government or the *Länder*, depending on which government level has been authorized by the federal law to issue secondary regulations. The *Länder* can also issue primary regulations as a result of their exclusive competences. This means that quality of regulations and the burdens contained in this regulatory ‘cascade’ can only be addressed through a shared effort (OECD, 2010).

### Germany and EU regulations

The Single Market Act, established in 1992, was developed with the aim to create a level playing field for all EU Member States. For this, the European Commission developed a clear enforcement policy to make sure that all Member States improve the transposition of EU laws in their national legislation and also to make sure that their national laws comply with EU legislation. The internal market scoreboard helps the Commission and the Member States monitor their achievements (European Commission, 2011a). The September 2011 EU Scoreboard reported that Germany's implementation deficit was 3 per cent of European directives to be transposed, ranking about average among EU Member States, although well above the target of 1.5 per cent set by the European Councils. In other words, transposition may be seen as a challenge by the administration because directives lack precision, and do not correspond with German legal terminology (OECD, 2010).

The German legal system is strongly influenced by EU law; just as in other EU countries, the influence of EU regulations is observable. In some areas such as agriculture and environment, this affects up to 80 per cent of regulations. As in most other EU countries, the federal government does not have a single policy lead for the management of EU affairs. Each federal ministry is responsible for its area of competence. Coordination is mainly carried out through the Federal Foreign Office and the Federal Ministry of Economics. Further, the role of the Federal Parliament is a significant feature of the German structure. It can extend to replacing the federal government during negotiations. Further, the Parliament agrees

on EU issues that have to be shared between the *Länder* and Federation. Impact assessment requirements on EU-originating regulations follow the same track as those for domestic legislation. In theory, the process for national laws is applied in the same way to impact assessment (OECD, 2010, p. 137).

### *Culture of risk regulation in Germany*

Like other Western European states (for example, France), German culture leans toward the avoidance of uncertainties. Studies examining the willingness of Germans to take risks have shown that most German people avoid risks (Falk, 2012). A 2011 study entitled *The Composite Index of the Propensity to Risk* found German culture to be strongly risk-averse, with the lowest propensity to risk, as compared with 17 other countries (Scorbureanu and Holzhausen, 2011). Therefore, it is not surprising that attempts to define acceptable risk have caused legal conflicts, resulting from stakeholders seeking to protect their constitutional rights to economic activity and health protection, for example. The fragmented federal system has contributed to these issues due to the presence of multiple decision makers with varying approaches to governing risks while also often having contradictory interests (Rothstein *et al.*, 2012).

### *How BSE changed the regulatory landscape in Germany*

Following the BSE crisis that hit Germany in the 2000s, the Ministry of Health as well as the Ministry of Agriculture (then responsible for food safety) faced harsh criticism toward their handling of the crisis, which resulted in the resignation of the minister of health and her colleague. The Ministry for Food, Agriculture, and Consumer Protection (BMVEL) was created and aptly named to emphasize the concerns and interests of the consumers. Because of the BSE crisis and the resulting loss of consumer trust, the Federal Agency for Risk Assessment (*Bundesinstitut für Risikobewertung*, BfR) was created in 2002 in the course of ongoing reforms (BfR, 2013).

The BfR is an institution directly under the control of the federal government and responsible for food safety and health. It is one of the largest assessment agencies in the EU. Not least because of its size, it is capable of conducting its own research and generating scientific reports. The BfR is a good example of a direct policy transfer from the European to the national context (Fischer, 2007). A scientific advisory council and several expert committees support the work of the BfR. It prepares expert reports and opinions on food and feed safety as well as on the safety of substances and products. Its tasks include the assessment of

existing and the identification of new health risks, the drawing up of recommendations on risk reduction, and the communication of this process. The results of its work serve as the basis for scientific advice to the relevant federal ministries and agencies (for example, Federal Office of Consumer Protection and Food Safety). Through science-based risk assessment, BfR provides important incentives for consumer health protection both inside and outside of Germany and closely cooperates with the European Food Safety Authority (EFSA).<sup>2</sup>

In addition to the formation of the BfR, there is another agency exclusively for risk management, the Federal Office of Consumer Protection and Food Safety (BVL). The BVL was established as an independent higher federal authority that plays a part in formulating general administrative rules to implement laws in the arenas of consumer health protection and food safety, as well as in the preparation and monitoring of surveillance schemes and plans by the *Länder*. It is responsible for implementing the European rapid alert system in the fields of consumer health protection and food safety in Germany (USDA Foreign Agricultural Service, 2012). The BVL usually draws on BfR risk assessments. It is evident that since the reform of the system in 2002, an institutional separation between risk assessment and risk management has been in place.

The basic German food Law *Lebensmittel- und Bedarfsgegenständegesetz* (LMBG) is a federal law, and its enforcement is the responsibility of the *Länder*. The LMBG consists of 230 different ordinances and has various special product groups' rules and regulations. The provisions of the LMBG are vast, complicated, and often subject to interpretation. In addition to the LMBG, in 2005 Germany developed a central Food and Feed Law Book (*Lebensmittel-, Bedarfsgegenstände-, und Futtermittelgesetzbuch* – LFGB), providing the basic definitions, procedural rules, and goals of the LMBG. The Food and Animal Feed Law Book of 2005 is not the only legal basis for German food regulation; it also adapts its national laws to those of the EU (Abels and Kobusch, 2010). Both acts define general food safety and health protection rules. These rules apply to nationally produced as well as to imported food products.

Today, a large amount of food laws from EU Member States have been fully harmonized into EU law. This means that all food products that are legally imported and distributed in one Member State can usually also be distributed in the others, except when one Member State can prove health concerns relating to the product. This sector's risk regulation harmonization stems from several food scandals (for example, BSE)

that struck Europe from the late 1980s to the 2000s. As a result of the BSE crisis in Europe (Paul, 2009), national regulatory arrangements on food safety had to be rethought and restructured. It is still necessary, however, to apply separately for approval of imports of those products containing substances not yet harmonized.<sup>3</sup>

### **Pharmaceutical regulation in Germany**

The pharmaceutical industry, similar to the food industry, is characterized by complex regulations and rules. This is a reflection of the splitting up of the pharmaceutical market in Germany into several sectors of the health system (Bungenstock, 2010). Clear deficiencies in the regulation of pharmaceutical markets in Germany are a result of conflicting interests of stakeholders in the health care system (Schreyögg *et al.*, 2004). Regulatory actions are alleged to be typically dominated by political interest rather than by economic evidence (Sauerland, 2001) (for more on this theory, see also Franke in Chapter 5). Germany's reputation suffers from a certain lack of transparency in health regulations, from overregulation, and from inconsistency of regulation.

The pharmaceutical market is partly under direct governmental supervision and partly regulated by self-governing and self-regulating institutions (Schreyögg *et al.*, 2004). The legislation process itself is also complex, as most of the bills concerning the regulation of the pharmaceutical market require the formal approval of the Federal Assembly (*Bundestag*) and the Federal Council (*Bundesrat*). Despite this, German health care policy is diffuse and efficiency remains a key goal (Mossialos *et al.*, 2004, p. 44).

Independent of the national authority regulating the health sector, European institutions have gained importance in the German pharmaceutical market. In the process of European integration, the pharmaceutical market and the health system have developed a tense relationship that derives directly from European law and has led to a coexistence of integration and divergence (Hancher, 2004).

Notwithstanding the above-mentioned tension between European competition and national health policy, the process of European integration required changes in the pharmaceutical market. European aspirations to harmonize the pharmaceutical legislation regarding the authorization of medicinal products are the most advanced of the regulated sectors. The origin of this harmonization can be found in Directive 65/65/EEC of 1965 (European Union, 1965). In 1995, the European Medicines Agency was founded as a common European regulatory

authority. Under European law, there are now two possibilities for drug approval. First, the central approval under Regulation (EC) 726/2004 of the European Medicines Agency automatically leads to a European-wide recognition for certain drugs and is obliged for certain drugs (European Union, 2004b). Second, there is an ability for national registration with simultaneous decentralized or subsequent mutual recognition through Directive 2001/83/EC (European Union, 2004a). If a participating Member State does not recognize the approval of another Member State, there is the possibility of an agreement between the Member States or, if this fails, a decision by the European Commission (European Commission, Competition DG, 2009; Lehmann, 2008).

An example to demonstrate Germany's approach to risk regulation in the pharmaceutical industry is the management of Actos, a drug for the treatment of type 2 diabetes. In 2000, the European Commission permitted the marketing of Actos throughout the EU. In June 2011, Actos had its sales suspended by medical regulators in France and Germany because of a possible side effect of increased bladder cancer risk. The decision to ban the drug was based on a study commissioned by the French Medicines Agency. The study examined cancer rates in approximately 155,000 people taking Actos in France from 2006 to 2009 and 1.3 million other diabetics who were not receiving the drug and found a 22 per cent higher risk of bladder cancer in those taking the drug compared with diabetics taking other drugs. However, Actos still remains available in the United Kingdom.

## **Discussion and conclusions**

### **Toward a risk-based approach**

The risk versus hazard debate has resulted in scrutiny into the best approach forward for European risk regulation. Calls have been made for regulations coming out of the EU to not be made based on arbitrary hazard or risk classifications, but rather as a result of the application of a risk-based approach, which takes into account the probability as well as the impact of potential adverse regulatory outcomes. Risk assessments, inherent in a risk-based approach to risk regulation, are science-based tools that allow for scientific rigor in the decision-making process (Löfstedt, 2011b). This type of rigor is alleged to provide an economically rational, targeted, and proportionate approach to regulation that can provide a check against precautionary bureaucratic cultures, a counter to pet interests and public misperceptions of risk, and an aid to innovation within government and industry (Rothstein *et al.*, 2012).

Progress has been made in harmonizing diverse approaches to food and pharmaceutical regulation following highly visible scares such as the outbreak of BSE and dealing with fears concerning pharmaceutical products (for example, Actos). The health, safety, and environmental sectors, for example, have taken steps toward establishing international guidelines for risk governance (Vogel, 2012); however, there exists considerable room for further harmonization from the local to international levels. A successful shift toward a risk-based approach in regulated domains will require continued understanding of how certain sectors (for example, food) have been able to harmonize risk-based regulations despite country-specific contexts. Additionally, each Member State must be understood in terms of its unique contexts (for example, regulatory structures, relationship to the EU, culture, history). Breaking down domain- and country-specific applications of risk versus hazard approaches to risk regulation can identify what unique features have allowed for successful harmonization and what strategies may be developed to emulate successful cases of risk-based regulation.

This chapter presented the regulatory structure of Germany and its regulatory relationship to the EU through the examples of food and pharmaceutical governance. Despite Germany's risk-averse and juridified culture, which would suggest a hazard-based approach to governance, the systematic application of a risk-based approach in food and pharmaceutical regulation is evident. This suggests that risk-based harmonization spearheaded by sector has the potential to supersede deep-rooted governance norms (for example, the food industry has successfully navigated Germany's governance structure for aligning domestic regulation to the EU). Despite both the food and pharmaceutical sectors being risk-based, there are differences between them, and they, in addition to other regulated sectors, need to be examined across all EU Member States for the purpose of furthering harmonization.

### **Policy recommendations**

The health, safety, and environmental sectors, among others, have traditionally governed within their regulatory silos with minimal communication across policy domains. These sectors must communicate best practices and share lessons learned with each other for the successful implementation of risk assessments for a risk-based approach toward regulation. This purpose of joining up these silos is to promote risk regulation harmonization among domains and Member States for consistency of product or activity classifications. The emergence of new

technologies (for example, nanotechnology, synthetic biology) that span borders as well as sectors has begun to provide new opportunities for regulators to collaborate for potential successful overall management.

Risk has become an organizing concept for regulation across sectors, and the number of risks to be managed continues to expand. Accountability is demanded in regards to regulatory outcomes, and therefore managing expectations in regards to levels of societal risk present is crucial for effective governance (Rothstein *et al.*, 2012). European-wide application of risk-based regulation must be accompanied by efforts, as needed, to address public understanding that governance cannot possibly eliminate all potential harms or 'adverse outcomes' (Graham, 2010). To try and do so can prove disproportionately difficult or extremely costly to try to achieve, inadvertently create other risks, or distract attention from other challenging problems. Thus, proponents of a risk-based approach advocate a moral shift from believing that the government can ensure absolute 'safety', 'security', or 'zero loss' toward the idea that the best government can do is seek to manage risk (Rothstein, 2011). All stakeholders benefiting from European-wide harmonization of risk regulation must contribute to a concerted communication campaign in order to see such a shift take place.

Recent scandals (for example, 2011 dioxin scare in German eggs, EU horse meat scandal) and the ensuing political responses continue to illustrate the challenges faced in harmonization. Successful harmonization will require a multidisciplinary (for example, risk, ethics, social science, political science, anthropology) academic effort to wholly address the challenges faced for a universal shift toward a risk-based approach across nation states and policy domains. This shift away from government-guaranteed 'zero-risk' requires public trust in order to become universally established (Löfstedt, 2005). This may be addressed through measures in public engagement (in other words, open government) and in stakeholder transparency (as discussed in Parts III and IV, respectively), and also by improving regulatory communication capacities and competencies. Addressing public concerns through more proactive efforts at risk communication could prevent any public confusion and set appropriate expectations for the future of risk governance. Calls have also been made for more concerted stakeholder efforts in education, training, and leadership (Löfstedt, 2011b). These recommendations are supported from evidence presented in this chapter, and it is encouraged that further country-specific analyses are conducted to support European-wide risk regulation harmonization.

## Notes

1. For more on impact assessment, see European Commission (2014).
2. For more details, see Abels and Kobusch (2010): 'EFSA was established and risk assessment by scientific experts was strictly separated from risk management tasks, which are left to policy-makers, most EU Member States set up specialized agencies with different organizational features. In several regulatory designs, a strict separation in the risk analysis process can be observed'.
3. See Article 47a of the Basic German Food Law (Government of Germany, 1997).



# 5

## State Intervention in Times of the Global Economic Crisis

*Michael M. Franke*

### Introduction

The outbreak of the global financial and economic crisis in 2007 brought the “active state” back into business. Western industrialized countries are now experiencing a return to stronger state interventions in the economy, which are considered as the answer to the tremendous distortions brought by the crisis. This crisis had its origins in the US financial sector and led to the near-collapse of the whole US financial system. The US crisis quickly spread to other Western countries, thus becoming a global problem. It also was not confined to the financial sector and spilled over – with a slight delay – into the real economy. These distortions had the effect that states, which had previously been reluctant to intervene, implemented rescue packages for individual companies or undertook industrial political measures for whole sectors.

As a consequence, the institutional arrangements of the affected countries have been challenged. While the precrisis discourse was much about a general trend in Western countries to liberalize and deregulate the economy, the discourse during the financial crisis emphasized the need for rescue package for the banks to prevent a collapse of the financial system and stricter bank regulations to prevent similar crises in the future. Furthermore, while the state as a regulation authority came under pressure and lost lots of its freedom to maneuver in the precrisis years, it has been proposed that the state regained much of its strength during the financial crisis (cf. Hassel and Lütz, 2010, p. 256; Mayntz, 2012, p. 12). Thus, it is reasonable to assume that two major tasks were put on the governments’ agenda: (1) the stabilization and protection of the financial and economic system on the

macrolevel, and (2) the protection of the workforce that was directly affected by the crisis (cf. Hassel and Lütz, 2010, p. 260; Mayntz, 2012, p. 21).

It is evident that “pure institutional approaches” such as Varieties of Capitalism (VoC) of Hall and Soskice (2001), which focus exclusively on domestic institutional structures, cannot adequately explain the extensive state intervention in recent years. Nor can institutionalist approaches alone explain the diverging intervention strategies pursued by these governments. This chapter advocates merging the institutionalist view with the societal approach (cf. Schirm, 2009, 2013a), and argues that material interests and societal ideas can explain the divergent approaches of state intervention. Thus, the aim of this chapter is to offer an analysis of endogenous preference formation by incorporating three independent variables (institutions, interests, and ideas) to explain the dependent variable “state intervention measures.”

The research questions driving this investigation are: (1) why did national governments change their strategies of minimal state intervention measures during 2007–10<sup>1</sup> and (2) how did these strategies diverge among governments?<sup>2</sup> This chapter will try to answer these questions as follows. First, it will explain and unpack the concept of “state intervention measures.” The subsequent section will provide an overview of the theoretical approach. In the final section, this claim will be tested empirically in two case studies, which examine the differences and similarities of state intervention measures in the banking and automotive sectors of Germany and the United Kingdom. The banking sector has been chosen because the insolvency of financial institutions marked the starting point of the global financial crisis, whereas the automotive sector is relevant because it illustrates the impact the crisis had on the real economy. Germany and the United Kingdom are promising country case studies because the former stands for an economic system that is more open to state intervention measures, whereas the latter is much more skeptical in this regard.

### **Dependent variable: state intervention measures**

At this point, a short explanation of the dependent variable “state intervention measures” is necessary. According to Ikeda (2004, p. 21), intervention measures are a ‘doctrine or system based on the limited use of political means [...] to address problems identified with laissez-faire capitalism’. In this analysis, state intervention measures will be defined

as the deliberate use of political means by a national government to directly influence private economic activities within a country. This definition has to be complemented by the distinction that intervention measures always imply interventions in the economic process, while they do not contribute to shaping the economic order, unlike regulatory policy. However, this does not exclude the possibility of such interventions altering norms and behaviors in the long run. Thus, even short-term measures launched to protect the society from economic crises might have a more permanent effect on the state's institutional order. In this sense, the following types of possible intervention measures should be distinguished:

1. state intervention measures by rule setting;
2. state intervention measures by interventions in private economic activity, for example, through subsidies, protectionism, or state investments; and
3. state intervention measures as coordination mechanisms (cf. Brösse, 1999, p. 127).

In this chapter, the second (subsidies) and the third points (coordination) are especially relevant due to the fact that this chapter is going to examine the direct government responses to the crisis. In contrast to subsidies, protectionism, state investments, and coordination mechanisms, new rule settings take longer to be implemented.

### **Endogenous preference formation of state intervention measures**

In this section, a theoretical approach of endogenous preference formation will be outlined. Briefly summarized, its assumptions are (1) that political decision making takes place within existing institutional constraints and (2) that domestic ideas and material interests will shape political behavior within this institutional context. This approach is based on assumptions made by the VoC and the societal approach (cf. Hall and Soskice, 2001; Schirm, 2009, 2013a; Franke, 2013).

According to the liberal theory of International Relations, a source of inspiration for the societal approach, it is assumed here that the three independent variables are sufficient to explain the dependent variable "state interventionism measures." "Societal ideas, interests, and institutions influence state behavior by shaping state preferences, that is, the fundamental social purposes underlying the strategic calculations of

governments' (Moravcsik, 1997, p. 513).<sup>3</sup> Moravcsik explains this by the fact that 'states do not automatically maximize fixed, homogeneous conceptions of security, sovereignty, or wealth per se, as realists and institutionalists tend to assume. Instead [...] they pursue particular interpretations and combinations of security, welfare, and sovereignty preferred by powerful domestic groups' (Moravcsik, 1997, p. 519). Therefore, it should be noted that liberalism focuses primarily on the importance of interests and ideas of domestic groups or the society as a whole. Institutions, however, remain widely unconsidered as an independent variable in this approach.

This chapter, much like the whole book, argues that institutional factors play an equally significant role in the decision-making process. In this regard, institutionalism provides some complementarities to the societal approach that focuses on the importance of the independent variables ideas and interests to explain diverging government positions. This will be shown by the application of insights from the VoC approach, which refers to the three main types of institutionalism: historical, rational choice, and sociological institutionalism.<sup>4</sup> The VoC literature assumes that there are two ideal types among Western economies distinguishable according to their institutional design. One is the liberal market economy (LME), which is typically represented by Anglo-Saxon countries such as the United Kingdom; the other ideal type is the coordinated market economy (CME) with Germany as the lead example. A central feature of both types of economies is institutional complementarities, which include market coordination mechanisms in LMEs and nonmarket coordination mechanisms – such as collective partnerships or informal corporate roundtables – in CMEs. Institutions are developed over time and, once established, affect future actions. Furthermore, the actors within these institutional contexts act rationally in order to realize their preferences (cf. Soskice, 1996, p. 2; Hall and Soskice, 2001, p. 8; Noble, 2010, p. 2). According to the VoC, which was created as a company-centered approach, the state's role in the CME is fundamentally different than in the LME. On the one hand, in CMEs, the state is perceived as an actor that regulates the economy and, where appropriate, provides some support; on the other hand, in LMEs, the belief in the "lean state" prevails, with the state performing only a rule setting function. Its influence on the market is limited to (low) taxation and only the most necessary social services (cf. Green *et al.*, 2010, p. 24). State intervention is therefore not to be expected in LMEs, whereas in CMEs the possibility of intervention to save companies or industries as a last resort exists.

## **Independent variables: institutions, interests, and ideas**

### *Institutions*

As mentioned earlier, institutions are viewed as the contextual frame for the formation of interests and ideas. This chapter employs Schirm's definition: institutions can be 'represented in codified forms of ideas and/or interests' (Schirm, 2013b, p. 691). However, despite their origins in ideas and/or interests, and different from the societal approach, this contribution emphasizes institutions as an independent variable, since they constitute their own category that (1) can deliver explanations for policy decisions different from the independent variables mentioned in the following and (2) must not necessarily be entirely congruent with the current set of domestic interests and ideas, given their long-term evolution as outlined in this book's introduction and, consequently, institutional complementarities. It is assumed here that institutions do not solely determine actors' decision-making processes, as is assumed in the VoC literature, but impose some restriction on it – whether rational or normative. Thus, changing a country's institutional framework is not impossible but requires in any event certain preconditions, such as a critical juncture. The latest financial and economic crisis might qualify as just such an event that challenges the effectiveness of the given institutions and thus places them at a crossroads (cf. Mayntz, 2012, p. 7).

### *Interests*

Regarding interests, this chapter will follow the definition as used in the societal approach. It defines interests as 'material economic considerations of domestic groups which can alter rapidly according to changing circumstances understood as new benefits and costs induced by globalization and (new) global governance' (Schirm, 2009, p. 504). In this sense, economic actors are assumed to shift their preferences in the context of changing circumstances – such as the global economic crisis – in order to adjust to the new conditions. Interests have a high explanatory value when firms or economic sectors are affected. Their representatives express their concerns and demands to the respective national government. If interest groups are powerful – for example, well organized, economically relevant (per cent of GDP), or with a large number of employees – the government is probably more willing to act in their favor (cf. Eising, 2009). This is due to the fact that both interest groups and politicians should be viewed as rational actors, with the latter's main aim to remain in office and win reelections (cf. Downs, 1968,

p. 34; Schirm, 2011, p. 51; Franke, 2013, p. 21). The government's decision not to follow particular interests could thus be attributed to a lack of coordination among interest groups or to the marginal economic importance of the sector.

### *Ideas*

Unlike interests, ideas are regarded here not as being exclusive to one single group but as socially embedded. Schirm defines ideas 'as path-dependent and value based collective expectations on how politics should govern the market. Ideas can express themselves in societal attitudes in institutionalized form in the political culture and system of a country' (Schirm, 2009, p. 504). However, given the latest economic crisis, this definition of ideas can be perceived as too narrowly conceived. For example, it does not include the possibility of abrupt paradigmatic shift in times of major crises. This chapter argues that, since there is no economic paradigm shift evident despite the crisis, the fundamental ideas will still have explanatory power (cf. Hodson and Mabbett, 2009).

According to the independent variables, the following hypotheses can be derived:

#### *Hypothesis 1 – institutions*

If crisis-related state intervention measures are undertaken by national governments, then they will be compatible according to the domestic institutional complementarities. The measures will not alter the institutional framework, but will, instead, make use of them.

#### *Hypothesis 2 – interests*

If crisis-related state intervention measures affect an economic sector that is important for the labor market, contributes a significant share to national value added, and/or has cross-sectoral relevance, then it can be explained by domestic material interests due to intensive lobbying by strong interest groups.

#### *Hypothesis 3 – ideas*

If an economic sector is less important for the labor market, does not contribute a significant share to national value added, and/or has no cross-sectoral relevance, then crisis-related state intervention measures can be explained with societal ideas.

## Case studies

### State intervention measures in the banking sector

#### *The United Kingdom*

The financial crisis seriously affected the United Kingdom, starting with the collapse and nationalization of the bank Northern Rock in late 2007. As the crisis continued, the financial market produced further imbalances. The UK government responded to these developments on 8 October 2008 with several initiatives to support bank recapitalizations by providing loans and guarantees. In sum, these measures to mitigate financial instability contained a total volume of £500 billion. Furthermore, some banks were nationalized: the Royal Bank of Scotland (RBS), HBOS, and Lloyds TSB. The latter two merged to form Lloyds Banking Group in 2009. The cost to the state of the nationalization of these banks was up to £66 billion by the middle of 2012 (cf. United Kingdom. Office for National Statistics, 2012; Reece, 2012). In this way, besides short-term liquidity, the solvency of the banking system in maintaining lending to the real economy in the medium term was ensured. But how are these policy decisions to be explained? As mentioned earlier, an LME such as the United Kingdom is usually expected to be skeptical of state intervention measures.

First, according to the assumptions made in the hypotheses, the role of the UK financial industry for the country's whole economy has to be considered:

- At the beginning of the crisis in 2008, the UK financial sector realized a share of over 9.1 per cent of the gross value added (GVA), compared with 5.8 per cent in 2001 and 9.4 per cent in 2010 (cf. United Kingdom. House of Commons, 2012, p. 3).
- As an integrative part of the economy, the UK banks are crucial for the supply of finance to the real economy, in particular to innovative and fast-growing sectors. According to the VoC literature, financiers expect short-term profits with high rates of return and thus make use of the market-based financing models typical for a LME (cf. Woll, 2011, p. 24). The City of London is additionally a world leader in innovative investment products (cf. Vitols, 1995, p. 19; Soskice, 1996; Mayer, 2002, p. 317; Lerner, 2009, p. 40). This might explain the traditionally strong financial lobby in LME countries such as the United Kingdom (cf. Hemerijck, 2009, p. 34). As *The Economist* (2009, p. 28) states: 'Understandably, the government is scared to risk further erosion of London's position as a global financial centre'.

Given the above-mentioned observations, it can be assumed that material interests are a better explanation than ideas and institutions for government intervention measures in this case. The following question remains, however: how could it happen that the United Kingdom undertook intervention measures that contradicted the prevailing idea of free market and competition, as well as its institutional framework as a LME? The answer to this is that the measures were considered to be exceptional and short term. Then Prime Minister Gordon Brown explained:

We needed a fundamental restructuring of the banks, in some cases the nationalisation of banks, to be able to deal with the scale and the fundamental problem that the banking system had. [...] We decided that a normal injection of resources into the economy, letting the automatic stabilisers work, would be quite insufficient to deal with the scale of the loss of output that was taking place around the world. (Brown, 2009a)

Additionally, the government did not act without considering the view of the banks themselves. Before launching the loan and guarantee packages in October 2008, the leading banks explained ‘that they broadly back a plan for the Government to take equity stakes in return for capital injections’ (Griffiths and Quinn, 2008).

### *Germany*

In October 2008, the crisis spread to the German financial system, with Hypo Real Estate (HRE) as its first victim. The German government reacted by taking the UK stabilizing policy as a model and announced enormous governmental rescue packages, comprising comprehensive state guarantees and capital measures available for the financial industry, with the aim of avoiding a collapse of the whole economy. The German Bundestag, using an accelerated procedure, adopted a rescue package to stabilize financial markets on 17 October 2008. The so-called Financial Market Stabilization Act (*Finanzmarktstabilisierungsgesetz*, FMStG) pursued fundamentally similar goals as its British counterpart, ensuring the solvency of financial institutions and preventing a credit crunch from affecting the broader economy. Furthermore, under this act, the Financial Market Stabilization Fund (*Sonderfonds Finanzmarktstabilisierung*, SoFFin) was created. The fund’s aim was ‘to overcome the current liquidity shortages and to improve the capital base of financial firms based in Germany’ (Germany. Bundesanstalt für



Finanzmarktstabilisierung [FMSA], 2008, p. 1). Amounting to a total volume of €480 billion, of which €400 billion are warranties to revive the interbank market and up to €80 billion is available for the recapitalization of banks as well as the purchase of risky assets, the fund enabled the state to directly intervene in financial institutions. The rescue packages also conformed to the ideational constitution of German society. According to Simons (1997), the German government has frequently intervened in the economy in the past. Despite the fact that individual bankers were perceived as responsible for the recent crisis, the idea of the government as the firefighter in critical situations was widely accepted. However, the fact that the German government had chosen this specific way, with the nationalization of banks as *ultima ratio*, made possible by the *Finanzmarktstabilisierungsergänzungsgesetz* (Supplementary Financial Market Stabilization Act) resulting in the “squeeze out” of HRE, can be best illustrated by providing an overview of the position of the German banking system within the country’s whole economy, as was done earlier for the United Kingdom:

- In 2007, one year before the outbreak of the financial crisis in Germany, about 1.2 million people were employed in the German financial sector and contributed about 4.0 per cent to the GDP. The number of employees makes it one of the largest employers for highly skilled and highly trained labor (cf. Germany. Bundesregierung, 2008). However, these figures already show that the German banking sector is much smaller than its counterpart in the United Kingdom.
- Furthermore, unlike the United Kingdom, the German financial system is bank-based, which means that the prevailing model is that banks provide firms directly with loans (cf. Woll, 2011, p. 24). This is particularly true for small and medium enterprises (SMEs) and their *Hausbanken* – although only about 39 per cent depend on one single bank (cf. Busch, 2005, p. 133; Bluhm and Martens, 2009, pp. 589, 600). Although the role of the banks has changed over the past years, its importance for the real economy is still essential. Thus, the stronger interrelation between banks and companies is supposed to be one explanation why Germany, unlike the United Kingdom, did not experience a serious credit crunch (Deutsche Bundesbank, 2010a, 2010b).

The above-mentioned facts and figures thus give a first impression why there was a strong economic interest to save the banking sector. The following question remains, however: why did Germany

not undertake such extensive intervention measures like the United Kingdom? One important factor can be found in the idea that the state should act as a firefighter if required, but aside from that should be as market friendly as possible. As German Chancellor Angela Merkel stated in a speech: 'Above all, to address this crisis and prevent a recurrence, a proper regulatory framework be created, which however, may not kill all market forces and severely restrict them' (Merkel, 2009). Another important factor was the question of the assumed "systemic relevance" of the financial industry, and, thus, the institutional constraints this sector imposed on the rest of the economy. On this matter, the then German finance minister, Peer Steinbrück, said: 'The term "systemically relevant" is true only for the banking sector, because this is the arterial system that supplies the economy with capital. In addition, the banks can trigger a domino effect, which does not occur in the real economy in such a manner' (Steinbrück, 2009). In this context, the government also received support from the banking industry, as made clear by Josef Ackermann, CEO of the Deutsche Bank, at the beginning of the crisis: 'I no longer believe in the self-healing forces of the markets. Banks alone cannot save the situation. There are only a few strong banks in the world. There is no point to take the risks of others and run into danger himself' (Ackermann, cited in *Focus Online*, 2008).

### **State intervention measures in the automotive industry**

#### *The United Kingdom*

The importance of the automotive industry for the UK economy has decreased significantly over the past 30 years. The most important policy measure during this time was privatization. Respective British governments allowed market forces to downsize manufacturing, which resulted in the general de-industrialization of the country; the economic future was assumed to be in the service sector (cf. Reitan, 2003, p. 56; Crafts, 2007, p. 274; Bailey and Kobayashi, 2009).<sup>5</sup> More recently, this trend even strengthened. While the downward movement in sales was already notably high in 2008, production slumped dramatically one year later, over the course of the economic crisis. These negative developments were particularly important for the region of the West Midlands, where the automotive industry is highly developed, with assembly plants around Birmingham. The Labour government reacted with the adoption of a number of sector-specific measures for the car industry, with the aim of stabilizing the regional economy as well as the specific economic sector (cf. United Kingdom. House of Commons, Business, Innovation and Skills Committee, 2011, p. 26). An important

measure was the Automotive Assistance Programme, a £2.3 billion package of loans and loan guarantees. It consists of government guarantees worth £1 billion as well as £1.3 billion from the European Investment Bank. Its aim was the provision of access to finance for healthy companies with turnovers above £25 million in the UK automotive and automotive supply sectors. The funds were to encourage investment in new green technology development projects. Furthermore, a car scrapping scheme was launched, offering consumers a discount of £2,000 under certain conditions when they bought a new vehicle (cf. United Kingdom. Department for Business, Innovation & Skills, 2009). In facts and figures, the British automotive industry can today be characterized as follows:

- The sector is much smaller but also more productive than 30 years ago. 'In terms of international trade, the automotive industry, including engines, generates £25 billions sales [sic] – some 10 per cent of UK exports' (Cooke, 2009, p. 3).
- It contributes currently about £10 billion to the UK economy, which is about 1.0 per cent of the annual value added (cf. United Kingdom. Houses of Parliament, Parliamentary Office of Science and Technology, 2010, p. 4).

Despite its consolidation, the automotive industry is still far away from being as relevant as in the past. Thus, policy decisions in this field can be best explained by ideas and institutions. Then Prime Minister Gordon Brown justified the extensive assistance package for the UK car industry, emphasizing that the UK government underwent a learning process:

We will not repeat the mistakes of the past, when whole industries, vital to the strength of our country, were left to fend for themselves, and whole communities were abandoned. I will not allow that to happen. Instead, we want not just to help the car industry through the recession, but also create the basis on which it can transform itself into an industry fit for the future, ready to prosper and grow when the recovery comes. (Brown, 2009b)

This statement illustrates a slight willingness of the government to deviate from the previous path of nonintervention. Due to the crisis, a "traditional" industry such as the automotive industry gained more importance. The government's decision to intervene in this sector,

however, can best be explained by ideas: namely, the perception of the United Kingdom as an industrialized country with a strong industrial base. In this context, Peter Mandelson spoke about the need for 'new industrial activism' (cf. Mandelson, 2008). This new approach has been continued by the new Conservative government, which came to power in May 2010. In his first official speech as the new Prime Minister, David Cameron focused heavily on the UK economy and stated that its heavy reliance on just a few industries and a few regions should not continue: 'That doesn't mean picking winners but it does mean supporting growing industries' (Cameron, 2010). Thus, the Tories, too, have decided to leave the path of noninterventionism.

### *Germany*

In the course of the economic crisis, the German automotive industry had to cope with a slump in production and sales, which were viewed with concern by politicians, business, and the general public. An intervention measure to avoid the most negative effects was the car scrapping scheme (*Abwrackprämie* or *Umweltprämie*). This instrument's aim was to avoid a slump in car sales and car production as well as to promote more energy-efficient cars. Germany was one of the first countries to introduce such a scheme, and its car subsidy program was also the largest in scale. The incentive was worth €2,500 and was paid when a vehicle at least nine years old was traded in for a new one with Euro-4 standard.<sup>6</sup> The scheme came into force on 14 January 2009 and ran until the end of the year. Its budget was about €1.5 billion (cf. Fojcik *et al.*, 2009). According to the number of new car registrations, the car scrapping scheme was a success, while in other countries such as the United Kingdom, Italy, and Spain, which at the time did not (yet) have car scrapping schemes, car sales continued to fall (cf. *Financial Times Deutschland*, 2009).<sup>7</sup> Another crisis-related policy measure was the so-called *Kurzarbeit* (short-time work). This implied that 'employees work fewer hours per week and the government subsidizes part of their salary. This scheme reduced the financial burden for the employer and workers were prevented from being sacked because of the crisis-induced temporary reduction in business for their companies' (Schirm, 2011, p. 56). In facts and figures, the German automotive industry looks as follows:

- Compared with the United Kingdom, the German automobile industry has paramount importance for the country's economy. The German automotive sector's annual turnover was about €263 billion in 2009, and the share in the total exports of manufactured goods

amounts to 20.2 per cent. The export quota of domestically produced cars reached 74.4 per cent in 2008 and 69.0 per cent in 2009 – when the crisis hit the carmakers (cf. Germany. Bundesministerium für Wirtschaft und Technologie [BMW], 2010).

- Vitols describes the success of the German automobile industry in global competition as a result of the great expansion in the production of traditionally low-volume premium carmakers (cf. Vitols, 2006, p. 399).
- The upstream and downstream industries are highly important for the special status of the German automobile industry. The automotive suppliers' contribution to the domestic value added stands at about 80 per cent in the power train segment and at 90 per cent in the electronics segment (cf. Bächstädt and Fröhlich, 2010, p. 6).

Regarding the car scrapping scheme, this can be best explained by material interests and institutional factors. The government's intention was to assure consumers and the producers that the state had their best interests at heart and was not abandoning them in times of a crisis (cf. Fojcik *et al.*, 2009, p. 8). Martin Winterkorn, CEO of Volkswagen, Germany's largest car producer, stated in February 2009 that he considered the car scrapping scheme as a success for his company and would ask Chancellor Angela Merkel to extend it (cf. *Zeit Online*, 2009). The strength and global notoriety of the German car industry can additionally explain why German politicians made such a big effort to rescue Opel, the German subsidiary of General Motors, which suffered from structural problems that were reinforced by the crisis. Conversely, the financial difficulties of the holding company Arcandor, which was engaged in retail and tourism, were ignored, and eventually the firm became insolvent. As an institutional explanation, the *Kurzarbeit* scheme represents a typical CME measure.

## Conclusion

The global financial and economic crisis is one of the most drastic events in recent years to have impacted economic, political, and societal systems. The sharp economic downturn provoked a large number of diverging responses as the affected states sought to protect their industries and, thereby, labor force. However, as the comparison of Germany and the United Kingdom has proven, countries' intervention measures to overcome the crisis diverged. While the UK government implemented a more extensive rescue package for the banks, Germany's car scrapping

scheme to help the automotive industry showed its greater interest in supporting this sector, as compared with the United Kingdom. Furthermore, the United Kingdom's effort regarding the automotive industry can be interpreted as a very uncommon measure for an LME. The explanation by the independent variable ideas revealed that the UK government aims to provide the country with a stronger industrial base – and thus deviated in some respect from the path of nonintervention. The reliance on the financial sector has been challenged by the crisis and led to an increased orientation toward a broader industry base. In Germany, it can be concluded that ideas and institutions proved very stable over the course of the crisis – as revealed in both case studies. The typical corporative mechanisms of a CME were sufficient in the automotive industry as well as in the banking sector. Material interests had to be considered in both cases, but they were surely predominant in the automotive sector. The measures taken toward the banking sector can best be explained as motivated by a mix of institutions, interests, and ideas.

Regarding the broader question posed in this book about the institutional order and its change, this chapter highlights especially how change and stability appeared during the global financial crisis. In the German case, it can be seen that the crisis led to a stabilization of the institutional order. The institutional arrangements of the CME turned out to be effective in mitigating the crisis effects, and thus there was no discussion about the need for any larger adjustments. In contrast to Germany, the case of the United Kingdom was not that clear, and the outbreak of the crisis entailed a serious challenge to the institutional arrangements of this LME. The previous sections have revealed that the country faced a great debate, concerning how appropriate the previously followed pure free market philosophy was in the light of the crisis. However, according to the findings of this chapter, it can be stated that this debate did not bring a major change in the sense of Hall's third-order change (cf. Hall, 1993; Hodson and Mabbett, 2009). The relevance of material interests was too strong, and thus the UK government followed interest groups to a large extent. On a smaller scale, however, some changes can be observed in the country. Most relevant is the fact that the crisis enabled new ideas to enter the debate. Thus, even if there is no radical change to be seen immediately following from the crisis, it cannot be excluded that there will not be incremental institutional change. In sum, the use of the here presented approach of endogenous preference formation seems promising and might enable further research to pursue the answer to the question of how change appeared in the long run in countries affected by the crisis.

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## Notes

1. The time frame covered relates to measures of state interventionism that reached its first peak in this period.
2. An additional research question that might be posed is whether the assumed changes were first-, second-, or third-order changes according to Hall (1993), which vary from short reaching to more permanent structural changes. This chapter, however, will focus only on the above-mentioned research questions.
3. For a similar argument, see Katzenstein (2005, p. 18).
4. For further reading on institutionalism, see Hall and Taylor (1996, p. 937ff), Sanders (2006, p. 39ff), and Shepsle (2006, p. 23ff).
5. The government simultaneously focused its policies on attracting foreign direct investments. The effect on the British automotive industry was that the carmakers were taken over by companies from abroad. Today, there are no longer any independent British carmakers.
6. Euro-4 is a European emission standard for vehicles that was in force until 2009. The emission standard in force to the end of 2013 is Euro-5.
7. For example, in the United Kingdom, the total scrapping scheme provided a total sum of only £300 million (cf. Reuters, 2009).

# 6

## The Sources of Security Regulation Convergence

*Jesse Paul Lehrke and Rahel Schomaker*

The question of convergence in security regulations among Western liberal democracies – regarding its desirability, feasibility, and reality – has featured prominently since the terrorist attacks of 9/11. Given globalization and the interdependencies it creates, as well as the heightened and unique threats it engenders (Furlong, 1981, p. 77; Epifanio, 2011, p. 400), most experts now see convergence as desirable and necessary if the protecting state is to fulfill its function (United Nations, 2004; Rees and Aldrich, 2005, p. 923; Sandler and Siqueira, 2009, pp. 175–6; Wheeler, 2011). Convergence keeps transaction costs down, allows economies of scale, and can facilitate a comprehensive, gap-free counterterrorism architecture even in the global multilevel system (in part see Cortell and Davis, 2000, pp. 65–6).

Yet in the immediate post-9/11 years, it seemed that convergence was not occurring (Katzenstein, 2003; Rees and Aldrich, 2005). The United States had taken a commanding lead in counterterrorism activities (Rees and Aldrich, 2005, p. 905; Rees, 2009, p. 111), but its unilateralist approach undermined its ability to export its policies, despite a stated intent and effort to do so (White House, Office for Homeland Security, 2002; Rees and Aldrich, 2005, p. 916; Shapiro and Byman, 2006; Pawlak, 2009, p. 9). Indeed, some scholars questioned whether convergence was possible given the differing cultures and normative perspectives on security strategies, individual rights, and the role of the state in balancing these – even among Western states (see especially Rees and Aldrich, 2005).

Nonetheless, by 2005 the trans-Atlantic tensions following the United States-led invasion of Iraq had eased and convergence was evidenced (Rees and Aldrich, 2005, p. 906). The Bali, Madrid, and London bombings had set in motion a political logic of response in Western states that required governments to take new counterterrorism measures



(Garfinkel, 2004; Albrecht, 2008, p. 15; Indridason, 2008; for theory, see Jervis, 1978, p. 208; Arce *et al.*, 2011, p. 379). Citizens demanded protection, and governments responded by integrating counterterrorism into numerous aspects of public administration. By 2012, both quantitative (Epifanio, 2011) and qualitative (Albrecht, 2008) studies had verified convergence was occurring, a finding confirmed by area and policy experts (see especially Zaiotti, 2012; see also Argomaniz, 2009; Pawlak, 2009; MacKenzie, 2011).

Despite the fact that we now know convergence is a reality, the source of this convergence – and the underlying reasons for its timing, extent, and occasional absence – remains largely unknown. However, the mode of convergence matters. Convergence through coercion by a leading hegemon (in other words, the USA) may ensure there are no gaps in the security architecture, but can lead to suboptimal policies (Simmons *et al.*, 2006, p. 797) as well as resistance from states that are forced to adopt measures incompatible with their own structures or norms. Convergence through competition encourages policy innovation but can lead to a defense race (Sandler and Siqueira, 2008) and the exporting of terrorist threats (for examples, see Katzenstein, 2003, p. 754). Identifying the source of the transnational convergence of counterterrorism regulations is essential in order to optimize the diffusion process, prevent vulnerabilities in the system, and ensure that adopted policies are the most effective and normatively appropriate, and therefore stable.

This chapter seeks to identify the sources of security regulation convergence. It will do so by first identifying the theoretical framework that underpins the study and drawing from it the most prevalent mechanisms used to explain diffusion. These mechanisms are used to develop several competing hypotheses that are tested through a ‘nested analysis’ (Lieberman, 2005), which consists of a quantitative regression analysis and a qualitative case study of Germany. The implications of the findings are then highlighted and used to inform policy options for optimizing transnational counterterrorism defenses even in a policy field where the nation state remains the key actor.

## **Theory, mechanisms, and hypotheses**

An examination of policy diffusion is necessarily grounded in theories of international relations (IR), from which the diffusion literature emerged. Given the long dominance of (neo-)realism within IR, the most common explanations of diffusion are rooted in the (neo-)realist

perspective. Specifically, diffusion is a result of either coercion by a more powerful actor or competition engendered by a first-moving actor (Waltz, 1979). Because competition and coercion cannot be quantitatively measured in a comparative way, we develop a unique indicator to test for these mechanisms. Coercion is foremost exercised by the system's hegemon, while competition is most often sparked when a great power is the leader in a given policy area (Carr, 1939, reprinted 2001, p. 80; Ikenberry and Kupchan, 1990, p. 292; Quéniwet, 2006, p. 382). In the current world order, this country is the United States. Indeed, the claim that the United States coerces other states to securitize is quite prevalent in the EU policy literature (Argomaniz, 2009; Pawlak, 2009; MacKenzie, 2011) and the United States is widely seen as a leader in counterterrorism activities (Rees, 2009, p. 111).

The reasons for this US leadership are several. The United States was the first and is arguably still the preferred target of current transnational terrorist groups. But because it is a superpower, the United States has interests spread across the globe. Combined with America's geographical isolation and heavy post-9/11 securitization, this often leads terrorists to target American interests abroad rather than at "home," what game theorists call target transference (Sandler and Siqueira, 2009, pp. 334, 338, 340; Bandyopadhyay and Sandler, 2011, p. 6 in online first edition of 27 August 2009). Therefore, as part of its system of layered defense (abroad, borders, and home), the United States pursues an externalization strategy seeking the 'forceful diffusion of its own internal security policies' (Argomaniz, 2009, p. 125; see also White House, Office for Homeland Security, 2002; Rees and Aldrich, 2005, p. 916; Shapiro and Byman, 2006; Pawlak, 2009, p. 9). This strategy, if guided by rational decision making, would concentrate on promoting strong security regimes in states where there are many US interests that could be targeted or through which terrorists could infiltrate. Aside from countries it occupies militarily, these states are primarily America's Western allies in Europe and Oceania (Marc Sageman in Shapiro and Byman, 2006, p. 46).

In these target states, the United States attempts to 'influence incentives' in order to force adoption of a given policy (Simmons *et al.*, 2006, p. 790; for examples, see Argomaniz, 2009, p. 133; Rees, 2009, p. 114; Archick, 2011, p. 13). However, given competition, specifically competition for security, such pressure may not be necessary. This is because of the aforementioned phenomena of target transference. When the United States takes defensive measures that make an attack in America less easy, terrorist groups shift their attention to American targets abroad. Thus, states with a heavy presence of possible American targets must

seek to protect those targets or risk (1) damaging their relations with America if there is an attack and (2) their own citizens and infrastructure being caught up in an attack. Thus, American decisions to adopt stricter security regulations 'significantly alter the status quo for others, giving the latter little choice but to follow suit' (Simmons *et al.*, 2006, p. 791). Based on the above argumentation, we developed our first hypothesis:

*Hypothesis 1: US footprint hypothesis*

The larger the US footprint in a country, the stronger is that country's security regime.

Despite anarchy, even neorealists acknowledge that cooperation is possible among states (Jervis, 1978). A common way of promoting such cooperation is through international networks, through the parts of the multilevel state that extend beyond the traditional Westphalian state boundaries. In their authoritative summary of diffusion mechanisms, Simmons *et al.* (2006, p. 787) stressed that diffusion can be 'mediated by the behavior of international organizations' but also that 'power can be exerted [...] through collective entities' (p. 790). Thus, international networks can both make a country more susceptible to a hegemon's influence and moderate the hegemon's policies (for a good discussion, see Pawlak, 2013, pp. 2–5). NATO is an example of a network in which US influence may be overwhelming (Risse-Kappen, 1994, 1996; Gheciu, 2005), while the EU is a venue in which America often has a seat, but where its preferred policies are usually watered down (Pawlak, 2009, p. 22, 2013, pp. 5–9; MacKenzie, 2011). In addition to diffusion through organizational networks, diffusion can also be promoted through individual networks, through persons who have extensive contacts in both America and a second country and who act as norm entrepreneurs (Goldman, 2006; Simmons *et al.*, 2006, pp. 795, 800; Pawlak, 2009, p. 11). Thus, our second hypothesis is the following:

*Hypothesis 2: network hypothesis*

The more embedded a country is in networks through which the United States could exert influence, the stronger is that country's security regime.

While networks may be a channel to communicate ideas, domestic structures and norms can influence whether an idea is accepted. Some domestic structures, such as a decentralized multilevel political system, are believed to make diffusion more difficult (Risse-Kappen, 1994). Despite this, following Checkel's (1999) idea of 'cultural match', policies

are said to be most easily adopted if the receiving state has domestic structures similar to the sending state. While Checkel's idea is broader than this, for the quantitative hypothesis testing it is best to limit the conceptualization of cultural match to political culture and the structures that embody it. Our third hypothesis is thus the following:

*Hypothesis 3: matching domestic structures hypothesis*

The more similar a country's political structures to the United States, the more its security regime resembles that of the United States; in other words, the stronger is that country's security regime.

In any study of diffusion, it is important to consider 'the "null hypothesis" of independent decision making' (Simmons *et al.*, 2006, p. 804). The adoption of stricter security regimes could be primarily nationally driven and nonetheless exhibit convergence. Because the current global war on terror represents a general threat to all, it has come to resemble a structural condition of the international order, one to which all states – especially liberal Western democracies (Shapiro and Byman, 2006, p. 44; Epifanio, 2011, p. 399) – are exposed.

While all states must respond to this threat and protect their citizens, territory, and interests, there are only so many instruments available for counterterrorism. From this perspective, the convergence mechanisms are learning and emulation (although competition for security could still be an underlying factor). When a state implements a seemingly effective policy, other states copy it. Nonetheless, despite the general threat and cross-country similarities, there would still be some regulatory variation driven by country-specific policies, histories, and characteristics that makes them more desirable terrorist targets. These observations give rise to our final hypothesis:

*Hypothesis 4: national characteristics hypothesis*

The higher the terrorist threat to a country based on national characteristics, the stronger is the security regime.

It is these four hypotheses that this study tests in order to determine which mechanism drives domestic security regimes: the US footprint, networks, matching domestic structures, or national characteristics. The analysis will also look for any relationship between the hypotheses as well as whether any particular subcomponent of a hypothesis is most significant. The next section summarizes the indicators used to capture these hypotheses.

## **Variables: operationalizing the mechanisms**

### **The American footprint**

This variable seeks to capture two interwoven dimensions: (1) the number of potential American targets in a country and (2) the level of physical interactions between America and the second country. Analytically, it is for future research to see if the dimensions have different impacts. This variable is a composite of five indicators: military presence (number of US bases and their concentration; personnel), diplomatic presence<sup>1</sup> (number of missions and direct hire employees), American tourists (number of American visits or stays in tourist accommodations), American business interests (US direct investment; number of employees of American multinational corporations), and the American “Flow”<sup>2</sup> (major transport hubs; total port traffic; total air passenger; ports participating in the US Container Security Initiative [CSI]).<sup>3</sup>

### **National drivers**

To see if there are national drivers leading to securitization, our study includes four groups of variables that may be of importance (Epifanio, 2011; Perliger, 2012). These are the following: country policies (domestic and international policies that could make a country a target for terrorism such as participation in Middle Eastern wars or seemingly anti-Islamic social actions), national conditions (the percentage of Muslim population; military expenditures and missions), terrorism (national and international attacks), and other, theoretically relevant “usual suspects” (GDP/GNP, colonial history, and territorial area). On a methodological note, as processes take some time to unfold, we lag many of these variables by one or more years.

### **International networks and matching domestic structures**

In order to capture the effects of networks, we include variables for the following: United Nations Security Council (UNSC) membership (permanent and temporary), EU and NATO membership, and the number of US missions to large Intergovernmental Organizations (IGOs) in the host country. Additionally, we include two variables to capture personal networks: educational exchange and the number of persons of diplomatic rank that a country sends to its missions in the United States.<sup>4</sup> Finally, we include three variables that capture aspects of the domestic political structure: common law tradition, executive power, and decentralization.<sup>5</sup>

## Dependent variable and methodology

Our dependent variable is taken from Epifanio's *Legislative Response to International Terrorism* (LeRIT) dataset.<sup>6</sup> LeRIT codes for the presence/absence of 30 different possible restrictive regulations that are used for counterterrorism purposes.<sup>7</sup> These 30 regulations fall into the following 3 dimensions: privacy rights, procedural rights, and immigration rights. These dimensions can be analyzed separately or totaled; we do both. When the regulations are totaled, the outcome variable can take on a value between 0 and 30, which means in quantitative regression models it can be treated as an ordinal variable (several classes) or a count variable.

Methodologically, we use nested analysis, which is a mixed-method approach that combines quantitative and qualitative elements (Lieberman, 2005). This approach allows us to include more and "fuzzier" variables than pure quantitative studies. We then test these in multiple different models with different indicators, thereby obtaining a good idea of which variables deserve further attention. The quantitative analysis is thus a 'plausibility probe' that 'focus[es] directly on the goal of theory development, by aiming at clearer specification of a theory and its variables and by attempting to better identify which cases might prove most valuable' (George and Bennett, 2005, p. 111). The qualitative component then uses structured focused comparison of the case to the specific findings of the quantitative analysis in order to more deeply examine the variables and see which hypothesis is strongest.

For the quantitative analysis, we use several different types of regression analyses to capture the effects of different explanatory factors on the dependent variable.<sup>8</sup> The set of variables for the explanatory factors contains binary dummy variables, as well as numeric factors (integers, percentages, and index data). The data are partly drawn from other studies and partly generated by the authors. The 2 general regression models are used for the whole dataset of 19 (OECD) countries and for several years (2002–8) of the post-9/11 era.<sup>9</sup> As the outcome variable, in addition to overall legislation (Table 6.1), we also tested the three different dimensions of legislation separately (not shown). On examining the structure of the data, we decided to use a model with a *Poisson distribution* and a log-link function for most of the tests. The goodness of fit in the models used is high, so that the models chosen can be assumed to be suitable.<sup>10</sup>

For the qualitative analysis, we examine the German case because for the most part it falls off-the-line of what we would expect if our

hypotheses have significant predictive power; that is, Germany has a large US footprint, extensive networks, and high domestic risk factors, but only average restrictiveness in its legislation. Such a case will be most useful for reinforcing the indicative findings of the quantitative study while also explaining why some aspects of the quantitative study did not come out as expected.

## **Outcomes of the empirical tests and discussion of findings**

For the interpretation of our findings, we focus on the value of  $Exp(B)$ , regression coefficients which can be interpreted as the rate of change between the independent variable and the logarithm of “expected counts” of the dependent variable.<sup>11</sup> These so-called *log odds* are not as easily interpreted as regular regression coefficients, which clearly indicate the relation between a specific predictor and the outcome variable. The relevant information here comes from the significance level of the variable and the direction of the sign – the positive or negative effect on the dependent variable. Thus, we report only this information in Table 6.1.

To open with the clearest findings, we found that the number of national attacks and the existence of a major transnational attack have a slight, but significant positive influence. These findings can be interpreted as evidence that a national security threat has a relevant impact on legislation. The first, number of national attacks, means that specific threat is taken into account. Other variables that are nationally driven and raise specific threat were also found to have a significant positive impact on security regime. These include having recent anti-Islamic social acts, a large Muslim minority, a history of a terrorist campaign, troops in Iraq, and an Afghanistan command role. Only military expenditures behaved unexpectedly, having a negative significant effect. However, this variable is subject to considerable lags and fixed costs. The more time-variant peace operations variable did have a slight, but significant positive effect. Thus, the strongest findings support the national hypothesis.

However, major attacks seem to have an even greater significance transnationally than in the targeted country. This supports the importance of international diffusion via the existence of a general threat rather than a specific threat. The fact that the lagged major attack variable is not significant supports the proposition that it is the increased threat perception highlighted by the attack and not foreign legislative/regulatory example that is diffusing. Thus, this factor, though transnational, also supports the national hypothesis via competition for national security.

Table 6.1 Results of regression analysis

Parameter	Exp(B)	Exp(B)	Exp(B)	Exp(B)	Exp(B)
	i	ii	iii	iv	v
Number of observations ( <i>n</i> )	86	112	133	101	123
Constant	++**	++*	++*	++***	+
Terrorist incidents (one-year lag)	++**	++**	++*		
Common law tradition (dummy = 1)	++*	++**	++*	++**	++*
US component (in attack) (one-year lag, dummy = 1)	+	+	+	+	+
Major terrorist attack (country-year) (one-year lag, dummy = 1)	+	—	—	—	+
Major terrorist attack (year) (dummy = 1)	++*		++*	++***	
Former colonial power (dummy = 1)	—***	++*	++*	++*	+
Embassy direct hire employees	—**		++*		
NATO membership (dummy = 1)	++*		—		+
Federal system (dummy = 1)	+	+	+	—	—
IGO missions	++*			++***	—*
Number of US visits	n				
Strong executive (dummy = 1)	—				—
EU membership (dummy = 1)	++*	—		+	++*
International air hub (dummy = 1)	+	+		—	—*
Afghan troop numbers	n				
US military personnel	n***				
GDP (log)	++*				
GNP per capita				n	
Year 2002 dummy (dummy = 1)				—***	
US military bases	—				
US military sites	+				
Anti-Islamic social acts (dummy = 1)	++**			+	+
Diplomats in United States		—		+	
Educational exchange		n		n	
Cargo Security Initiative (CSI)		++**		—***	
Port traffic (in TEU)		n			
Cargo hub					—
Missions					++*
Total military locations					—*
Air Passengers		n**			
Sustained domestic terror campaign (dummy = 1)				++***	
Government right-leaning					+
PKOs					++*
Military Expenditures (per cent of GDP)				—**	
US Direct investment position				n**	
US MNC employees				n	
Total DoD personnel				n	
Military base concentration				+	
Muslims as per cent of population				+	++*

Indicator: (+) slightly positive; (++) positive; (—) negative; (—) slightly negative; (n) no influence. Significance at the (\*) 1 per cent level, (\*\*) 5 per cent level, and (\*\*\*) 10 per cent level. Poisson distribution.



The significant influence of log GDP – reflecting national capability as compared with the threat factors above – further supports the national hypothesis.

Regarding networks, the results are also fairly clear and significant. Country membership in the EU and NATO, but even more so the act of hosting an IGO headquarters, has (significant) positive effects in almost all models tested. This finding supports the validity of the network hypothesis. Indicators on diplomatic networks (both foreign and American), where included, were either not as important or in the wrong direction as expected. Additionally, the educational exchange variable does not have any influence. Thus, it seems that organizational networks and socialization matter more than personalized networks and norm entrepreneurs.

As for matching domestic structures, the fact that a country has a common law tradition has a significant positive influence on legislation in all models. This indicates that the hypothesis holds to some extent. However, in only one (ordinal) model did having a federal system lead to a stronger security regime, as the cultural match would predict. Having a strong executive was also significant only in the ordinal model, but in this case in wrong direction; it led to a less restrictive security regime. Our regressions that separated the three legislative dimensions (not shown) reveal these findings may be due to differences between the three areas of legislation, the competence for which may be divided differently in different decentralized systems. This may explain why this study and those of Risse-Kappen (1994) and Goldman (2006, p. 90) all reached different conclusions on diffusion and (de-)centralization.

Turning lastly to the footprint hypothesis, the results are less clear. In all models, the number of military bases or sites displays an ambivalent picture – slightly positive and significant in some models, and slightly negative and/or insignificant in others. The variables for tourists and diplomatic and military personnel do not have an influence in all models. In almost all models, the lagged variable for terrorist attacks targeting US overseas assets has a positive impact on legislation, but this is not always significant. The only important US footprint factor is the presence of an air hub, which has a – more or less – significant effect on restrictive legislation generally (Poisson and ordinal model [not displayed]) as well as on privacy and immigration legislation specifically (Poisson model). Yet related indicators such as the CSI, air traffic, port traffic, and US direct investment do not have a clear influence, indicating hubs are likely special cases. Thus, an overall conclusion as to whether or not the US footprint has a significant influence could not be easily drawn, as the results are inconsistent.

While this inconsistency could be the result of technical shortcomings, we have been methodologically rigorous precisely because of the challenges of this study and believe – following King *et al.* (1994, pp. 6, 10) – that even if the experiment was not perfect, our scientific inferences can still be valid. Thus, to propose what our findings could mean: the “inconsistency” could be reflecting (1) important US policy shortcomings or (2) a greater ability of the countries examined to resist US pressure to securitize. In the first case, perhaps the US externalization strategy is not being properly and rationally directed toward likely targets and is instead implemented haphazardly. In the second case, which is supported by the finding that national characteristics were more significant in our tests, it may be that no matter how well directed the US externalization strategy, countries are still often able to resist this pressure. We will now turn to the German case to see if it indicates which of these scenarios is most likely.

### **The German case**

Germany has long had active domestic terrorist groups and experienced a sustained campaign by transnationally connected left-wing terrorists from the 1970s to the early 1990s. It has also been at the heart of several major transnational terrorist incidents, including the 1972 Olympic attack, the 1986 Berlin disco bombing, and possibly even the 1988 bombing of Pan Am Flight 103. Nonetheless, after a brief overreaction to leftist groups in the 1970s (Perliger, 2012, pp. 525–6), Germany became widely regarded as an easy place from which terrorist groups could operate (Katzenstein, 2003, p. 751; Miko and Froehlich, 2004, p. 2; Albrecht, 2006, p. 4).

However, given the heavy US footprint in Germany and the connection of the 9/11 hijackers to Hamburg, one would expect Germany to be a natural target for the US externalization strategy. Indeed, a review of the US Department of State (DoS) reports on Germany indicates extensive and expanded post-9/11 engagement (conferences, dialogues, liaisons, and so on) on counterterrorism issues. Nonetheless, based on timing and discourse, the initial significant tightening of the German security regime from 2001 to 2002 seems to have been a response to the perceived rise in general threat after 9/11, not US example or influence. Subsequently, in 2003 and especially 2004, Germany regulations were lighter than in most countries, leading one report to warn that ‘shortcomings in German domestic policy could directly threaten U.S. security’ (Miko and Froehlich, 2004, p. 15).

In 2005, Germany implemented a much stricter immigration and foreigner law, possibly in light of the general threat raised by the Madrid 2004 and London 2005 attacks, which were often brought up in legislative debate in the subsequent years (TTSRL, 2008). However, this only brought Germany back close to the mean, where it has since remained. Despite two significant failed plots – a failed bombing of two trains in 2006 and a plot to attack Ramstein Air Force Base in 2007 – there was no increase in the level of restrictions in those years, although 2007 did see the extension of many of the provisions of earlier laws that had sunset clauses.

Looking beyond where our dataset ends, Germany dismissed the autumn 2010 terror alert even as intelligence revealed they were the specific intended target (in the end, they did cave and increase their security measures). In 2011, there was the first successful Islamist attack when a lone gunman killed two US servicemen at the Frankfurt airport. Meanwhile, very-low-level right- and left-wing terrorism has continued (see, for example, *Constitutional Protection Report 2010* [Germany. Interior Ministry, 2011]). The former became a political sensitive issue in 2011 and inspired a plan to emulate a US terror database system (*BBC News*, 2012). Aside from this plan, there has been no significant new regulation since the end of our analysis period.

To see why Germany has only a midlevel security regime despite a strong US footprint and specific terrorist threats, we need to look back at the 2008 controversy over the so-called BKA law. According to opposition politicians, this law sought to ‘create a German FBI’ (Renate Künast in *Spiegel*, 13 November 2008). Interior Minister Wolfgang Schäuble, the law’s main backer, was often perceived to advocate ‘provocative US-inspired anti-terror tactics’ (ibid.). This could indicate the existence of learning and emulation, much like the aforementioned database, something which supports the network hypothesis. It also represents emulation of a United States-inspired federal solution to the challenges of law enforcement in decentralized states.

However, the BKA law, along with the European Arrest Warrant and the use of the so-called Grid Search to mine data, as well as – ‘with direct reference to 9-11’ (TTSRL, 2008, p. 14) – the Aviation Security Act (2005) and the conviction(s) of Mounir el-Motassadeq, was found by the German Constitutional Court to be in violation of the Basic Law (the German constitution) (in part see Albrecht, 2006, p. 15, 2008, p. 32; Walter, 2007, p. 18).<sup>12</sup> Thus, this case supports the importance of domestic norms reflected in legal tradition. The BKA law was also found to violate some principles of German federalism. This supports the theory

that federalism inhibits diffusion, even if the statistical findings found the opposite.

But a focus on formal regulations may not capture the whole picture, as counterterrorism has increasingly shifted from the realm of politics to the realm of administration. In lieu of legalistic approaches, many countries show an increasing 'reliance upon soft modes of regulation rather than on formal legal arrangements' (Pawlak, 2009, p. 14). Albrecht (2008, p. 28) found this shift toward 'deformalized' regulation also in Germany. An example from the EU level was the rather informal sharing of SWIFT banking data with the United States, which remained 'fairly secret' until its existence was leaked in June 2006 (MacKenzie, 2011, p. 10). In a more extreme example, the German authorities in Afghanistan participate in compiling the 'Joint Prioritized Effects Lists' that designate individuals, extrajudicially, to be captured or killed (Bendiek, 2011, p. 19). Such soft regulations are difficult to capture in quantitative analyses. Yet soft regulations, often international in character, may be a substitute for national regulations.

The above indicates that the extent to which Germany is subject to US influence seems to be primarily through international networks or even joint operations, consistent with its historical preference for multilateralism (Katzenstein, 2003, p. 740). Many of the provisions in German counterterrorism legislation originate from the EU, where, as mentioned, the United States has some influence. Despite a large US footprint and extensive US engagement, Germany does not seem motivated to increase security simply for US interests. Equally so, Germany does not seem overly concerned with specific threats and is more likely to respond to general threat. Indeed, the US DoS annual country terrorism reports often express exasperation at how domestic structures (constitution, federalism, and so on) hamper German counterterrorism efforts.

## **Conclusions and implications**

When considered together, the findings of the nested analysis most strongly support the national characteristics hypothesis. Nonetheless, policy is not determined by domestic conditions alone; two external factors are of importance. First, networks embedded in organizations seem to lead to convergence through learning and emulation; the more international aspects of the multilevel state, the more convergence. Yet additionally, our findings support others who have found that operational networks – shared mission-oriented experiences in Iraq, Afghanistan, and elsewhere – may also lead to convergence (Ikenberry

and Kupchan, 1990; Elron *et al.*, 1999; Febbraro *et al.*, 2008). However, the influence of networks is still filtered through domestic structures that influence the final regulatory outcome (consistent with Risse-Kappen, 1994). Second, states seem to heavily consider general threat when making policy, in keeping with the underlying mission of the protecting state. This reflects the importance of competition as an underlying mechanism of diffusion.

Coercion, specifically from the United States, as a mechanism receives less support. America's externalization strategy seems to be directed appropriately in some regards, although a comparative qualitative analysis is needed to verify this observation. However, countries seem to have more ability to resist US pressure than is often believed. Even when some elements of a state, often the executive, support the adaptation of a policy, opposition from the legislative or judicial branches often means that in the end, said policy is not adopted. From a US policy perspective, the externalization strategy would be greatly furthered if the international export of a regulation was considered earlier in its design phase (compare Rees, 2006, p. 99), although democratic politics and national culture make this difficult.

This outcome is normatively good from two perspectives. First, from a liberty and legitimacy perspective, it is positive that domestic norms trump foreign preferences. Second, learning and emulation via networks is a desirable mechanism for diffusion, as policies more or less willfully adopted tend to be more efficient, effective, and tailored to country-specific conditions (see, for example, Simmons *et al.*, 2006, p. 797). However, from a security perspective the findings are less positive. The current pattern of convergence–divergence(–compromise) leads to wasted time pursuing ultimately doomed policies and results in gaps in the overall security architecture following legal rulings. Additionally, the desirability of competition as a mechanism of diffusion is mixed. Competition can increase effectiveness via innovation, but it also risks engendering a defense race and the exporting of a country's terrorist threat.

Taken together, the findings here support the importance of the nation state learning through international networks as it seeks to compete with other states to protect itself from general threats. These aspects – the nation state, competition, general threat (a representation of anarchy), and networks to manage relations – are the core elements of neorealism (or solutions to some problems of a realist world). While this is theoretical, it has practical implications, as modern IR and diplomacy are built upon this theory. Thus, current institutions can be used to solve the challenge of security in the face of terrorism. Based on the

findings here, the necessary step to hasten and optimize the process of convergence seems to be the expansion of current international and supranational organizational networks and the use of these networks to develop a more coordinated global security architecture, thereby mitigating the negative externalities of competition and protecting all states and citizens simultaneously.

## Notes

1. While US diplomats can form part of a network, and we are open to the idea that this indicator could support the network hypotheses, we take different primary indicators for networks, discussed in the following.
2. Physical connections serve as an entry point for Americans (even if just passing through) while they can also serve as infiltration routes for terrorists. Such routes, while not a physical footprint, do create physical targets.
3. While the CSI reflects a United States–promoted policy, it differs in character from the legislation in our outcome variable and thus should be usable as an independent variable.
4. Diplomats, both during their time in the United States and on repatriation, are likely to be key nodes in networks with US officials and norm entrepreneurs back in their home countries. The number of diplomats a country sends also reflects the importance the sending country puts on their relationship with America.
5. Common law tradition could be important, as sharing a legal tradition may make copying American regulations simpler. Regarding executive power, it has been found that the stronger the parliament, the more opposition United States–influenced legislation runs up against (Bendiek, 2011, p. 2; see also Albrecht, 2008, p. 27; Archick, 2011; MacKenzie, 2011, p. 3). A strong executive would counter this, and we would thus expect to see more US influence via equal peer-to-peer executive exchange and less need for consensus (in other words, compromise)–oriented policies. As for the influences of decentralization on security policy, the United States is a federal system and its legislation/regulations often take this into account, making it easier for other federal states to adopt US solutions.
6. Available at: <http://www.prio.no/Research-and-Publications/Journal-of-Peace-Research/Replication-Data/>.
7. For a list, see <http://www.polsci.org/epifanio/codebook.pdf>.
8. For example, cross-sectional regression analysis with categorized outcome variables for security regimes, as well as a model with a binary outcome variable to capture if the impact is “high” or “low,” using dummies for a “strong” or “light” security legislation. Strong (1) or light (0) is determined by whether the country’s total falls above or below the mean. SPSS Statistics 20 was used for the analysis.
9. Countries included are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.

10. We ran several robustness checks that back the quality of our analysis by showing quite similar outcomes for other model specifications.
11. In the following, we interpret the different models together, even if – due to the small sample size or other undetected factors – in several cases the different models show different outcomes, in particular regarding levels of significance.
12. For other possible examples, see *Transnational Terrorism, Security, and the Rule of Law* (2008, p. 21).

# **Part III**

## **Participatory State**



# 7

## User and Community Coproductio n of Public Services: What Influences Citizens to Coproductio n?

*Tony Bovaird, Elke Loeffler, Gregg G. van Ryzin, and  
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### Introduction

The traditional concept of the state, as represented by Max Weber's model of bureaucracy, is characterized by hierarchical and rule-based decision making and by public service delivery through government agencies. However, hierarchical authority is no longer the dominant element of the state, as participatory structures and processes in public administration have emerged. Coproduction is a core element in the institutional order of the participatory state.

User and community coproduction of public services has become an important topic in public administration, especially in light of the fiscal pressures facing many governments. Theoretical discussion (Ostrom, 1996; Alford, 2002, 2009; Bovaird and Loeffler, 2012; Pestoff, 2012) and case studies (Whelan and Dupont, 1986; Ostrom, 1996; Alford, 1998, 2009; Bovaird, 2007) have highlighted the potential of coproduction, but there has been little empirical research on citizen coproduction behaviors for large samples of national populations or at the local government level. The research reported here has addressed this gap.

Most definitions of coproduction stem from the seminal work by Ostrom and Ostrom (1977). They typically refer to the contribution of resources by service users and providers for the provision of a good or service, or for raising the level and/or quality of their provision (Brudney, 1983). For the research in this chapter, we have used the definition from Governance International that coproduction is about 'Professionals and citizens making better use of each other's assets,

resources and contributions to achieve better outcomes or improved efficiency' (Governance International, 2014).

As examples of how important coproduction may be to the creation of public value, in the United Kingdom there are about 1.8 million regular blood donors, 8 million people signed up as potential organ donors, and 10 million people are part of neighborhood watch schemes, all of which are essentially "individual" coproduction activities. More collectively, about 350,000 school governors help to run schools and may have a legal liability for the affairs of the school; about 5.6 million people help to run sports clubs; 750,000 people volunteer to assist teachers in schools, and 170,000 volunteer in the National Health Service (NHS). Moreover, in 2008 there were over 109 active time banks across the United Kingdom, in which 600,000 hours of time had been mutually exchanged (Ryan-Collins *et al.*, 2008), and this is growing. The Quirk Review (2007) estimated that there were well over 14,500 community buildings in the United Kingdom in community ownership and management and that, in addition, development trusts owned and managed at least £300 million worth of social assets. In addition, about 90 per cent of the care of people in need of "social care" in the United Kingdom is estimated to be given by unpaid caregivers – family, friends, neighbors, organized volunteers, and so on. These make an enormous contribution to the economy and to society – it has been estimated that the value of unpaid social care is around £89 billion per annum (p.a.), compared with the £19 billion p.a. of social care public expenditure (Buckner and Yeandle, 2007).

In this chapter, we explore coproduction behaviors and attitudes, and how they correlate with citizen characteristics, using data from a unique, large-sample survey in five countries (the UK, France, Germany, Denmark, and the Czech Republic).

## **Drivers and correlates of coproduction: the literature**

A number of studies have suggested that coproduction may arise in part as a response to shortcomings in government performance or public service provision. Studies using public choice theory have focused, for example, on questions such as how choice of a school helps parents to be active coproducers (Hill *et al.*, 1997; Brandl, 1998). Bifulco and Ladd (2006) show that contextual factors are more useful than institutional arrangements (charter schools versus public schools) in explaining higher coproduction in education by some parents. Contextual factors are also used by Marschall (2004) in order to explain why residents who

perceive substantial problems in neighborhood schools and crime are more likely to coproduce.

Individual attitudes, values, and motivations are also likely to explain variation in coproduction behaviors. Sharp (1978), for instance, distinguished among material incentives (money, goods, or services), solidarity incentives (the sense of belonging to a group), or expressive incentives (intangible rewards or satisfaction with morally good actions). Alford (2002, 2009) expanded this list to five possible sets of motivators including sanctions (punishment of deviating actions) and intrinsic motivation, which refers to the clients' sense of self-determination and competence. Alford (2002, 2009) concluded that material rewards and sanctions would work, if at all, only in the simplest of tasks. Instead, clients are more likely to be motivated by more complex rewards that include expressive incentives, solidarity, and intrinsic rewards.

Essential to such intrinsic rewards is the notion of self-efficacy, which refers to the sense acquired by an individual that they can carry out actions that entail some expected results. For example, political self-efficacy is 'the feeling that political and social change is possible, and that the individual citizen can play a part in bringing about this change' (Campbell *et al.*, 1954, p. 187, quoted in Madsen, 1987, p. 572). Research on self-efficacy, the belief in one's ability to perform a given task (Bandura, 1997, 2001; Gist and Mitchell, 1992), has generally supported positive relationships between self-efficacy and a range of performance measures and outcomes including task effort, persistence, expressed interest, and the level of goal difficulty selected for performance. According to Bandura (1997, 2001), one's self-efficacy beliefs significantly determine performance outcomes, and are not necessarily determined by the underlying skills that one possesses with regard to the task. Self-efficacy of citizens, therefore, might be an important factor in coproduction.

Finally, we expect coproduction behavior to vary by demographic and socioeconomic factors, including age, gender, education, employment status, and urban context. In particular, studies of civic engagement and volunteering suggest that women tend to volunteer more than men (Einolf, 2011), that older people generally engage more than younger people (Putnam, 2001), and that education level is positively related to various forms of civic participation (Hayghe, 1991; Egerton, 2002). Although it imposes constraints on free time, regular employment also facilitates networks and other resources that increase capacity for volunteering and civic engagement (Wilson and Musick, 1997). Thus, it is likely that the effects of these demographic and socioeconomic factors may be similar in predicting coproduction behaviors.

## **Institutional influences on coproduction**

The literature suggests a number of potentially important institutional influences on coproduction, some (although not all) of which we have been able to explore in our study. First, the level and nature of coproduction is likely to be shaped by the administrative and cultural context of a society, including public attitudes to the role of the state and the level of both bonding and bridging social capital in civil society. The present study includes five different countries from distinct administrative traditions: Anglo-Saxon (the United Kingdom), Germanic (Germany), Scandinavian (Denmark), Napoleonic (France), as well as a former communist regime (Czech Republic). However, five countries provide an insufficient sample to uncover statistically significant differences between contexts, and we need to bear this in mind when interpreting the data.

Different policy sectors are also likely to have a differential impact on coproduction. Haas (1992) claims that the networks of knowledge-based experts (or epistemic communities) constitute a source of power in framing the collective debate on issues related to the professions. In service delivery, this implies that policy areas in which service providers are highly professionalized with very specialized knowledge are likely to be less conducive to coproduction. The types of professionals who dominate in the services on which we focus in this study (community safety, local environment, and public health) differ considerably in their degree of specialization. Health requires specialists with a university degree, while the other two services involve field-workers with less specialized education. It is therefore expected that the challenges arising from the transition of a traditional expert-based health system to a coproduced health system will be considerable (Dunston *et al.*, 2009; Porter *et al.*, 2010), so that health will be less conducive to coproduction than the other two services.

## **Methodology of the EU five-country study**

The empirical investigation reported here compares the current state of user and community coproduction in the Czech Republic, Denmark, France, Germany, and the United Kingdom in 2008. It is based on a cross-national survey of users, a series of focus groups, and in-depth interviews conducted by the authors with a range of officers of public service organizations (in public, private, and third sector organizations) and with representatives of users and community groups.

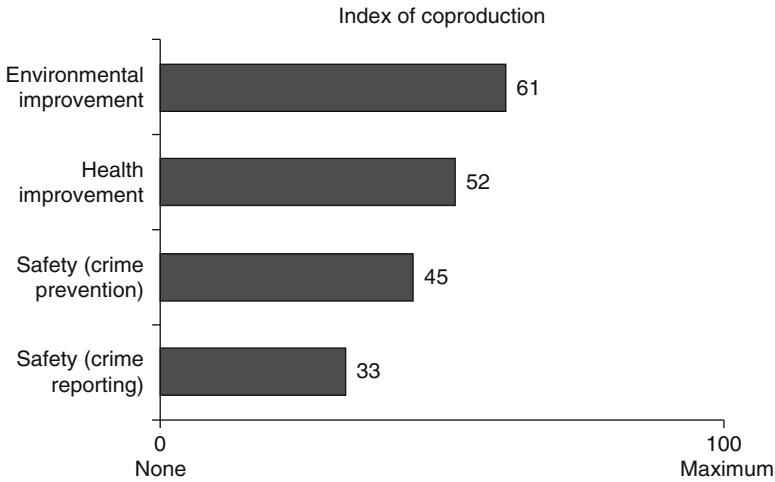
A citizen survey was conducted by telephone among a representative random sample of about 1,000 interviews in each of the five countries. The full study is reported in Loeffler *et al.* (2008). The results presented here are weighted according to each country's representation in the EU. Where figures are compared across countries or sectors, they are statistically significant at least at the 0.05 level.

The study focused on three different sectors that reflect distinctly different types of government functions. Coproduction by citizens in community safety, local environment, and public health may involve a whole range of activities, from helping to identify the problems, helping to prevent the problems, right through to solving the problems and dealing with the damage done by the problems. In the survey, given the limited resources available and the short time afforded by telephone interviews, we decided to survey all citizens, rather than survey service users only (since it is much harder to achieve representative samples of the latter). The survey focused particularly on preventative activities of citizens, asking them what they currently do – and what they would be prepared to do in the future – to help public agencies to prevent problems from arising. However, in the community safety questions, citizens were also asked about how they personally dealt with some problems, specifically how they react when they come across crime and antisocial behavior.

## **Findings from EU five-country study**

How important is the role of citizens in public service delivery? When we asked this question of the focus groups in the five countries, the overall reaction of professional service providers was “we don't know [...] but probably very little.” Indeed, participants often had to be challenged by the facilitators to come up with examples of citizen involvement in service delivery. However, in the citizen survey, contrary to the assumptions of focus group participants, the responses showed a significant level of coproduction by citizens in all five countries and in all three sectors.

We measured coproduction in the different sectors by a 0–100 coproduction index, which we created for each sector, representing the sum of five specific questions in each sector about coproduction behavior.<sup>1</sup> As Figure 7.1 shows, citizens are particularly active in taking steps to look after the local environment (index score 61), rather less active in health improvement initiatives (index score 52), and considerably less active in prevention of crime (index score 45). The coproduction index



*Figure 7.1* Total level of coproduction in community safety, local environment, and health issues

for reporting crime to the police and making personal interventions to stop someone behaving in an antisocial way was much lower (33).

### **Where coproduction works well ... and less well**

Figure 7.2 shows that in general citizens in these five countries show particularly high levels of engagement when they can undertake activities that do not need much effort by themselves and do not require getting in touch with third parties. This applies, for example, to locking doors and windows in their home before going out, recycling household rubbish, and conserving water and electricity, which about 80 per cent of citizens indicate as doing often. All these activities do not require interactions with other citizens or public sector organizations. When it comes to making changes to personal lifestyle, there is a sharp drop – for example, in the number of citizens who walk, cycle, or use public transport, or change to a more healthy diet or try to exercise. Just about 50 per cent of citizens reported doing these often.

Interestingly, all the activities at the bottom of the ranking list, meaning that citizens are rather less inclined to undertake them on a regular basis, involve getting involved with others – be it a neighbor, a doctor, the police, or strangers. At the very bottom of the responses on prevention activities is “seeking advice from the police on safety issues.”

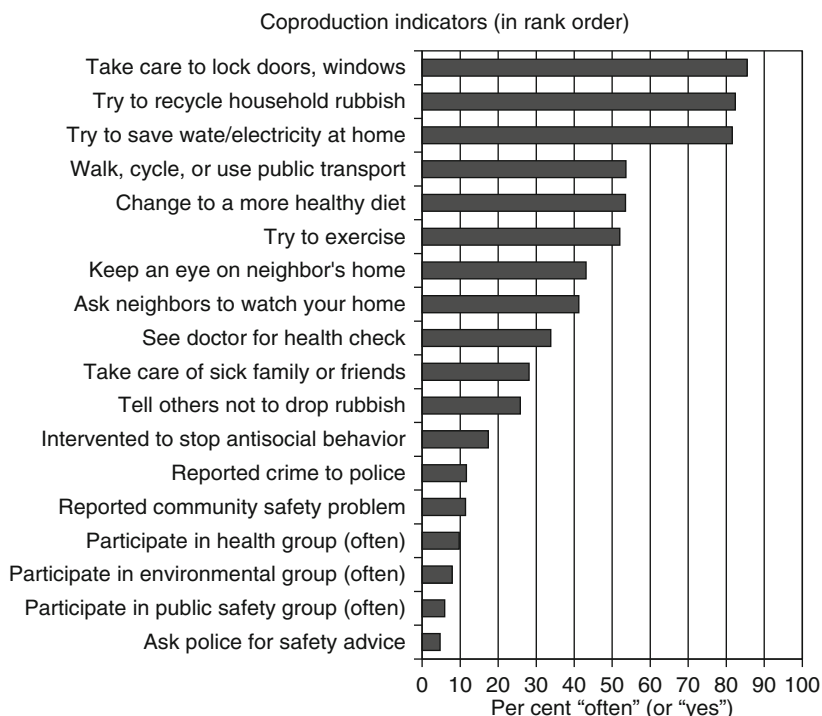


Figure 7.2 A ranking list of coproduction: what citizens like doing best and least

However, as Figure 7.2 shows, there are quite a few other activities with similarly low rates of response. In particular, very few respondents participate regularly in groups, whether the topic is community safety, local environment, or health. This clearly demonstrates that seeking to tackle these issues simply through organized associations has major limitations. For a focus on organized associations as creators of 'volunteer energy', see Brudney and An Woodworth (Chapter 8).

It is not surprising that only a very few citizens wish to get engaged in some organized form on a regular basis. This is where the so-called "usual suspects" come in, even though some countries seem to have more than others (see Figure 7.3).

Clearly, the level of regular participation of European citizens in groups and organizations is highest in health (9.7 per cent), followed by environment (7.9 per cent), and then safety (5.9 per cent). This is an interesting finding since the index of overall coproduction activities of

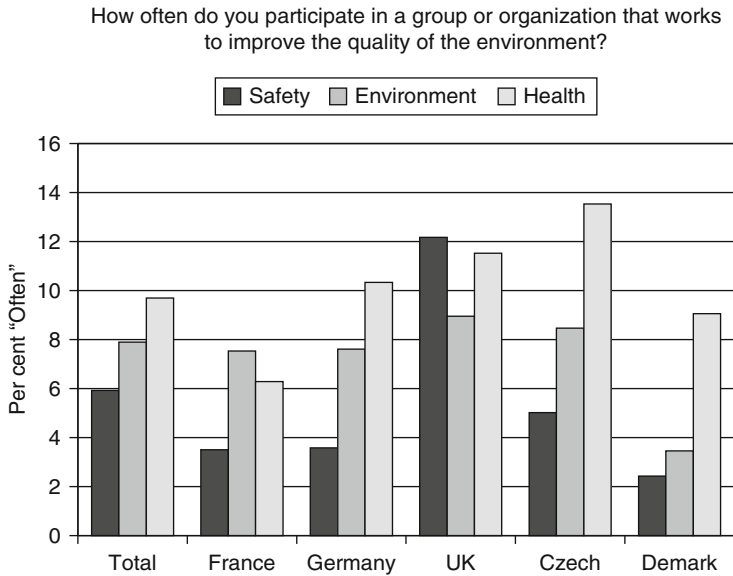


Figure 7.3 Levels of regular participation in community safety, local environmental, and health organizations/groups across countries

European citizens is highest in local environment and not in health (see Figure 7.1). The fact that more citizens “coproduce” in health by getting organized may indicate a lack of availability of individual forms of coproduction, which may partly be due to the attitudes of professionals working in health care, as participants in several focus groups on health issues suggested.

The number of “organized activists” in community safety and environmental issues is lowest in Denmark (2.4 per cent in safety-related organizations and 3.5 per cent in environmental organizations), whereas the United Kingdom has the highest proportion of citizens who often take part in organizations to improve safety in their neighborhood (12.2 per cent). This is not surprising, given that over 10 million people are members of UK neighborhood watch groups (although admittedly not all are active).

The United Kingdom also has the highest number of citizens who often get involved in environmental groups and organizations (9 per cent), although a high proportion of Czech citizens also participate often in groups or organizations to improve the local environment (8.4 per cent). Looking at citizens who frequently participate in groups



and organizations dealing with health, the range of responses was between 13.5 per cent of Czech citizens and 6.5 per cent of citizens in France.

It is interesting to see from Figure 7.2 how many people are prepared often to take steps to encourage others to behave more appropriately, for example, telling them not to drop rubbish (26 per cent) and intervening to stop antisocial behavior (17 per cent). Given that these are high-effort actions, and not to be undertaken lightly, this indicates that there is a significant group of the population who see themselves as real “activists,” at least in those areas about which they genuinely care. It also suggests that the deterrent to involvement in group activities is not inherently the effort involved.

In summary, the survey has shown that:

- There is already a lot more citizen involvement in public services than professionals in our focus groups suggested (particularly in local environmental and health issues).
- Involvement of citizens in public services clearly increases with age, so that the “aging society” is good news in terms of increasing levels of coproduction (although also potentially posing more demand on public services).
- Citizens are most willing to contribute toward improving public services when it involves them in relatively little effort and when they do not have to work closely with other citizens or public sector staff.

## Regression results of the five-country study

Our multiple regression analyses examined the correlates or predictors of coproduction in each of three policy areas, using two alternative measures of coproduction (Parrado *et al.*, 2013). Table 7.1 shows the regression analysis of coproduction behaviors (the index of five behaviors in each of the three policy areas), and Table 7.2 shows the regression analysis of the willingness to volunteer to coproduce. The significant coefficients ( $p < 0.05$ ) are shown in bold and shaded. In both tables, the predictors include efficacy of citizens, government performance, information and consultation, conditions, and demographic factors (age, education, urban, and active in the labor force). Most of the predictors proved to be statistically significant in multiple instances (far more than would be expected, given that at the 0.05 confidence level, 1 in 20 coefficients will show as significant simply by chance). However, the relationships that are most likely to be robust are those that are

Table 7.1 Regression analysis of coproduction behaviors (index of five behaviors)

Ind. Vars.	Czech Republic			Denmark			Germany			France			The United Kingdom		
	Safety	Environment	Health	Safety	Environment	Health	Safety	Environment	Health	Safety	Environment	Health	Safety	Environment	Health
Efficacy of citizens	0.09	0.09	0.07	0.16	0.18	0.15	0.08	0.14	0.19	0.20	0.19	0.17	0.12	0.21	0.18
Government performance	0.05	0.01	-0.03	0.00	-0.08	-0.06	-0.02	-0.01	0.08	0.01	-0.09	0.00	-0.02	-0.04	-0.06
Government information	0.01	0.04	0.03	0.00	0.06	0.09	0.06	0.05	0.01	-0.03	0.09	0.04	0.08	0.03	0.06
Government consultation	0.05	0.05	0.09	-0.05	-0.09	-0.09	0.05	0.01	-0.05	-0.01	-0.01	0.02	0.01	0.08	0.12
Conditions	-0.23	0.00	-0.03	-0.01	-0.02	0.03	-0.13	-0.01	-0.02	-0.07	-0.02	0.00	-0.07	-0.01	-0.05
Gender (female)	-0.03	0.11	0.15	0.07	0.07	0.18	-0.02	0.07	0.13	0.04	0.04	0.11	0.05	0.05	0.18
Age (years)	0.13	0.09	0.01	0.28	0.01	0.14	0.32	0.18	0.14	0.20	0.15	0.24	0.28	-0.04	-0.01
University educated	0.04	0.05	0.08	-0.04	0.07	0.05	0.01	0.00	-0.03	-0.09	0.02	0.05	0.02	-0.06	0.04
Urban resident	-0.02	0.10	0.07	-0.04	0.03	0.03	-0.01	-0.02	0.01	0.02	0.02	0.01	-0.07	0.01	-0.01
Active in labor force	0.00	0.03	-0.05	0.06	-0.08	-0.04	0.09	-0.03	0.02	0.02	-0.03	-0.06	0.09	-0.06	-0.06
R-Square	0.08	0.05	0.06	0.09	0.06	0.09	0.13	0.05	0.07	0.10	0.07	0.12	0.10	0.07	0.09
Listwise <i>n</i>	811	905	905	947	947	947	711	858	779	701	849	770	850	901	877

Note: Standardized coefficients shown; significant coefficients ( $p < 0.05$ ) are shaded and in bold.

Table 7.2 Regression analysis of willingness to coproduce (volunteering)

Ind. Vars.	Czech Republic			Denmark			Germany			France			The United Kingdom		
	Safety	Environment	Health	Safety	Environment	Health	Safety	Environment	Health	Safety	Environment	Health	Safety	Environment	Health
Efficacy of citizens	0.18	0.17	0.11	0.28	0.25	0.21	0.09	0.18	0.25	0.26	0.20	0.17	0.26	0.28	0.18
Government performance	0.04	-0.07	-0.01	0.01	-0.06	-0.04	0.05	0.04	0.03	0.09	0.01	-0.07	0.02	-0.06	0.01
Government information	-0.03	0.05	0.03	0.03	0.00	0.02	0.06	0.02	-0.09	-0.09	0.07	-0.03	-0.03	-0.01	0.04
Government consultation	0.06	0.05	0.02	<b>-0.09</b>	-0.05	-0.05	<b>-0.09</b>	-0.07	0.03	0.04	<b>-0.12</b>	<b>0.09</b>	-0.01	-0.01	-0.01
Conditions	-0.05	-0.03	0.04	0.05	-0.02	-0.06	-0.03	-0.02	0.00	-0.03	0.05	0.00	<b>-0.10</b>	-0.03	-0.07
Gender (female)	0.02	0.04	<b>0.13</b>	0.02	-0.05	0.06	0.02	0.03	0.05	-0.05	-0.01	<b>0.08</b>	-0.03	-0.01	0.05
Age (years)	<b>-0.09</b>	<b>-0.09</b>	<b>-0.16</b>	<b>-0.08</b>	-0.05	-0.06	-0.02	<b>-0.10</b>	-0.06	-0.01	0.00	0.00	<b>-0.12</b>	<b>-0.14</b>	<b>-0.15</b>
University educated	-0.04	<b>-0.10</b>	-0.04	-0.03	0.03	0.01	<b>-0.15</b>	0.01	-0.04	-0.07	0.00	<b>-0.07</b>	0.01	0.01	0.02
Urban resident	-0.04	-0.03	-0.01	-0.05	<b>-0.11</b>	-0.06	0.00	<b>-0.09</b>	-0.03	0.00	-0.05	0.00	-0.02	-0.01	0.02
Active in labor force	-0.01	-0.05	<b>-0.08</b>	-0.05	-0.06	-0.07	-0.01	-0.05	-0.06	-0.05	-0.02	-0.05	0.04	-0.03	-0.07
R-Square	0.05	0.06	0.07	0.10	0.08	0.06	0.04	0.06	0.07	0.08	0.06	0.05	0.09	0.09	0.06
Listwise <i>n</i>	808	911	918	947	947	947	717	865	802	697	848	771	856	901	906

Note: Standardized coefficients shown; significant coefficients ( $p < 0.05$ ) are shaded and in bold.

significant across policy areas within countries, or significant within a single policy area across countries.

It is clear that citizens' sense of personal efficacy is by far the most consistent and strongest predictor, of both coproduction behaviors (Table 7.1) and willingness to coproduce (Table 7.2), across all three policy areas and all five countries. Those who believe that ordinary citizens can make a difference in a policy area are more likely to be engaged in coproduction behaviors themselves and more willing to volunteer to coproduce.

In general, the pattern of correlation between citizens who coproduce and those who are satisfied with government performance, information, and consultation is weak and inconsistent. While satisfaction with government performance is largely negative (or near zero), as expected, it is only statistically significant in 2 of the 15 contexts. Satisfaction with government information was largely positively correlated with coproduction, although again only statistically significant in 2 of the 15 contexts. Satisfaction with government consultation has rather inconsistent relationships with coproduction – although the relationship was statistically significant in 4 of the 15 contexts; this was twice positive and twice negative.

As expected, we found that the perceived conditions generally have a negative association with coproduction behaviors (Table 7.1). All the statistically significant coefficients are negative in relation to conditions and almost all other coefficients are zero or negative. This is strongly the case with respect to safety – that is, better safety appears to lead very strongly to less coproduction, suggesting that citizen involvement in safety coproduction behaviors is in part a response to low levels of perceived safety in their community.

While a negative association between conditions and coproduction is also noticeable with respect to the willingness to volunteer to coproduce (Table 7.2), the relationships here are weak and mostly insignificant statistically. This is particularly interesting from a policy perspective, suggesting that those who have been most goaded into coproduction activities by dissatisfaction with local conditions may be already undertaking as much as they are prepared to do.

Looking at the sociodemographic factors, women generally engage more often in coproduction behaviors, particularly in the health sector (in all five countries) and in other sectors in the Czech Republic, Denmark, and Germany (see Table 7.1). Women appear only somewhat more willing to volunteer to coproduce more (see Table 7.2), again in the health sector. Again, this is consistent with the hypothesis that the

willingness of women to coproduce more than men has already been realized in their actual behavior, so that they are no more likely than men to be seeking further opportunities.

Older citizens are more likely to engage in coproduction behaviors related to safety in all five countries, and age is more broadly related to coproduction behaviors in Germany and France. However, older people generally report less willingness to volunteer to coproduce more, especially in the Czech Republic and in the United Kingdom. Again, this is plausible, given that many of this group are likely to be reaching physical limits on their time and energy. The rather higher willingness of younger people to coproduce more may also be a reflection of the relative lack of practical opportunities for young people to volunteer in ways that fit their lifestyle – this is consistent with comments made in the focus groups.

Being active in the labor force has a generally weak and inconsistent relationship with coproduction behavior, having a positive relationship with safety coproduction in Germany and the United Kingdom but a negative relationship with environmental coproduction in Denmark. Education also has a weak and inconsistent relationship with coproduction behaviors across sectors and countries (Table 7.1) – this is highly at variance with international evidence that participation in general is strongly correlated with level of education. It may indicate that the participation literature is highly focused on more consultative “participation,” rather than the preventative and service delivery behaviors on which we focused. Living in an urban area or rural areas appears to make no difference to coproduction behavior (Table 7.1).

In sum, the most consistent and largest predictor of both coproduction behavior and willingness to volunteer across sectors and countries turned out to be citizens’ sense of efficacy. We therefore ran additional regressions on the extent to which the other independent variables might predict or explain efficacy (Table 7.3). Satisfaction with government performance and with government information tends to be positively related to efficacy, as are perceived conditions in a policy area. This leads to the paradoxical situation that, while good conditions may directly dissuade citizens from coproduction, good conditions may indirectly encourage coproduction through enhancing citizens’ sense of efficacy. Women seem to have a somewhat heightened sense of efficacy, particularly with respect to the environment. Older citizens generally have a lower sense of efficacy (particularly in the Czech Republic, Denmark, and Germany). University educated citizens sense more efficacy in health matters. Efficacy does not seem to depend much on

Table 7.3 Regression analysis of efficacy of citizens

Ind. Vars.	Czech Republic			Denmark			Germany			France			The United Kingdom		
	Safety	Environment	Health	Safety	Environment	Health	Safety	Environment	Health	Safety	Environment	Health	Safety	Environment	Health
Government performance	0.04	<b>0.09</b>	0.02	0.06	0.08	<b>0.12</b>	<b>0.11</b>	0.20	0.05	<b>0.10</b>	0.06	-0.01	<b>0.12</b>	<b>0.12</b>	0.08
Government information	0.07	0.01	0.01	-0.01	0.02	0.06	<b>0.18</b>	<b>0.11</b>	0.04	0.00	0.00	0.02	-0.06	0.05	0.01
Government consultation	0.01	0.06	<b>0.09</b>	0.01	-0.04	0.02	0.03	-0.09	0.02	-0.04	-0.03	0.03	0.07	0.03	0.04
Conditions	0.00	-0.02	<b>0.14</b>	0.07	0.07	0.06	0.14	0.09	<b>0.11</b>	-0.01	0.03	0.07	<b>0.20</b>	<b>0.15</b>	<b>0.10</b>
Gender (female)	0.04	0.04	-0.01	0.02	<b>0.08</b>	0.06	-0.03	-0.01	0.04	0.03	<b>0.07</b>	0.04	0.02	<b>0.11</b>	0.05
Age (years)	<b>-0.20</b>	<b>-0.20</b>	<b>-0.08</b>	<b>-0.05</b>	<b>-0.17</b>	<b>-0.19</b>	<b>-0.17</b>	<b>-0.24</b>	<b>-0.15</b>	0.02	-0.02	0.04	0.00	-0.01	-0.04
University educated	0.05	0.03	<b>0.12</b>	0.05	0.02	<b>0.09</b>	0.05	0.06	<b>0.10</b>	0.07	<b>0.18</b>	<b>0.08</b>	0.04	<b>0.07</b>	<b>0.09</b>
Urban resident	0.04	-0.01	-0.03	0.04	0.03	-0.01	-0.06	-0.03	<b>0.10</b>	-0.04	-0.02	-0.04	0.03	0.03	-0.03
Active in labor force	0.01	-0.02	-0.01	<b>0.11</b>	0.05	-0.03	<b>0.10</b>	0.02	<b>0.08</b>	0.00	0.00	0.00	0.06	0.02	0.06
R-Square	0.06	0.06	0.06	0.04	0.05	0.08	0.17	0.14	0.09	0.02	0.04	0.01	0.08	0.08	0.05
Listwise <i>n</i>	816	916	920	947	947	947	730	874	815	704	853	777	860	908	911

Note: Standardized coefficients shown; significant coefficients ( $p < 0.05$ ) are shaded and in bold.

urban residence, and being active in the labor force appears positively related to efficacy in a few sectors in some countries (Denmark and Germany).

## **Discussion and policy implications**

This analysis of correlates of citizen coproduction of public services in three key policy areas – public safety, the environment, and health – has found that women and older citizens generally engage more often in coproduction. The finding that women are more likely to be coproducers than men is consistent with research that has identified a higher support for the public sector among women than among men, partly because public sector organizations employ more women and the public sector has taken over some care responsibilities of women (Christensen and Laegreid, 2005). Likewise, the high engagement of elderly people in coproduction compared with younger people is consistent with some findings that older people trust more in government as a consequence of their more collective orientation and their first-hand experience of building up the Welfare State (Christensen and Laegreid, 2005).

We expected that pluralistic administrative traditions (like in the UK) or traditions with more autonomous citizens (like Denmark) would have higher levels of coproduction. The results show that the highest level of coproduction is indeed in the United Kingdom. However, it turned out to be lowest in Denmark – this may be connected with the finding that those most satisfied with public services are least likely to get involved in coproduction, since Danes were the most satisfied of all five populations with conditions in all three services. Of course, it is not possible to conclude that differences in coproduction across the five countries in the sample are caused by differences in their administrative tradition, rather than the many other factors that differ across countries. However, it is clear that both the levels and the drivers of self-reported coproduction vary greatly between countries, factors which are worth exploring in future research.

We also expected that highly professionalized services such as health would trigger less coproduction because health professionals are likely to be more reluctant to let users coproduce services. In practice, the survey results showed less coproduction activity in health in all five countries than local environmental improvement – but health actually scored better than community safety in four of the five countries, a result which we hope to probe more deeply in further work. This may in part be explained by the high involvement of the “protecting state”

in community safety (and the ambivalence of many citizens about involvement with the police – as emphasized to us by the community safety focus group in the Czech Republic in particular).

We found, as expected, that self-efficacy – the belief that citizens can make a difference – is an especially important determinant across sectors. Further, self-efficacy seems to be linked also to good performance of government in service delivery. It will be important in future research to explore whether self-efficacy is endogenous, in other words existing coproduction levels could influence citizens' sense of self-efficacy, or whether an unmeasured variable (such as community or personal values) is influencing both self-efficacy and willingness to coproduce.

Interestingly, we also found that good performance (in the sense of a safe neighborhood, a clean environment, and good health) seems to have a negative direct effect on coproduction, suggesting that coproduction may depend in part on awareness of a shortfall in public performance, in line with the results reported by Marschall (2004). But good performance may have a positive indirect effect on coproduction, in turn, by enhancing citizens' self-efficacy.

Finally, this research has thrown up a major challenge to the public sector – citizens report a level of engagement in activities relevant to improving the outcomes of public services that is considerably in excess of that expected by local public officials and other stakeholders. The contrast between the focus group and survey responses suggests that public sector officials have only a very limited understanding of the coproduction activities that are going on in their field and in their area. This further suggests that user and community coproduction of public services is not properly understood, never mind systematically managed, so that its potential benefits are not currently being maximized. Further research will explore why this is and what might be done to bring the perceptions of public sector officials better into line with reality.

## Note

1. The index is a minimum–maximum (0–100) scale, with 0 representing minimum coproduction (answering “never” to all the coproduction questions) and 100 representing the maximum (answering “often” to all the coproduction questions).



# 8

## Overlooking an International Movement in Volunteerism? Understanding Citizen Involvement in Volunteer Centers

*Jeffrey L. Brudney and Dayoung An Woodworth*

Volunteer centers, also known internationally as ‘volunteer bureaus’ or ‘voluntary action centers’, are ‘community organizations that help to stimulate and coordinate local voluntary action’ (Brudney, 2005, p. 77). Thousands of volunteer centers exist worldwide (International Association for Volunteer Effort, 2009; Bos, 2014), involving millions of people in volunteering (Points of Light Foundation, 2005). Bos (2014, p. 17) reports that a total of about 2,000 volunteer centers operate in the United States (365), Denmark (75), England (324), Finland (37), Germany (322), Italy (415 local front offices), the Netherlands (238), and Norway (275) alone. Volunteer centers provide public services and mobilize volunteers whom they place in organizations that need them in the community. They are operated by nongovernmental and nonprofit organizations as well as by national, regional, and local governments. It seems that new structures of the participatory state are emerging.

Despite the vast scope of these volunteer centers, very few scholars have studied the effects of important external factors on the operations of these organizations (Lorentzen and Henriksen, 2011) or their performance and impact (Bos, 2014). In his international research, Bos (2014) was able to identify approximately 60 publications about volunteer centers. However, most of them were annual reports, summaries of volunteer center activity, or similar compilations. He could find only 14 studies that he considered ‘academically relevant’, 10 of which he referred to as ‘core articles’ (for complete listing, see Bos, 2014); just 6 of the core articles are in English (Ellis, 1989; Graff, 1997; Connor *et al.*, 1999; Osborne, 1999; de Palma and Paganin, 2002; Brudney, 2003). Although researchers have described the history of volunteer centers in

various countries (Bos, 2008a, 2008b; Lorentzen and Dugstad, 2008; Henriksen, 2008; Howlett, 2008), they have devoted little attention to understanding the sources of volunteer involvement in these entities or in comparable volunteer infrastructure organizations (Brudney, 2005). Scant research has attempted to explain the performance of volunteer centers, for example, their success in the key function of attracting and mobilizing volunteers (Oh, 2000; Lee, 2001).

In this chapter, we develop a model of citizen involvement in volunteer centers and evaluate it empirically based on data from South Korean volunteer centers for 2010. Because South Korean volunteer centers face the same challenges and opportunities as those in other countries, we believe the results can inform study and practice more generally regarding volunteer centers. We explore those issues at the end of the chapter.

### **Volunteer centers: functions and activities**

The primary function of volunteer centers is to mobilize volunteers and place them in organizations that need them in the community. In addition, volunteer centers may provide a wide range of services (for examples, see Ellis, 1989). Based on his research on volunteer centers in Denmark, England, Finland, Germany, Italy, the Netherlands, Norway, and the United States, Bos (2008a, 2014) proposes a framework for examining volunteer centers cross-nationally. The framework incorporates six main functions and three constituencies. Volunteer center functions encompass acting as a brokerage between volunteers and organizations, also known as the matching function, and, less often, marketing volunteering, encouraging good practices, developing volunteering opportunities, campaigning for policy, and developing volunteering strategically. Volunteer centers may provide services to three constituencies: volunteers, managers of volunteers, and the community. Bos (2008a, 2014) finds that due to lack of sufficient, reliable funding and other necessary resources, as well as differences in environments, contexts, and views of volunteer centers and of volunteering more generally cross-nationally, most volunteer centers do not fulfill all six functions or support all three constituencies.

Comprehensive statistics do not exist, but the studies and reports available suggest that volunteer centers impact millions of people across the globe. In a 2001 study, 286 US volunteer centers reported working with a total of 103,723 organizations, posting 939,443 volunteer opportunities, and placing 1,636,531 volunteers (Brudney, 2005, pp. 95–6, 99).

According to the Points of Light Foundation (2005), in 2005 the United States had more than 360 volunteer centers that partnered with more than 80,000 organizations and reached a reported 170 million people; this network of volunteer centers connected an estimated 2.5 million people with over half a million opportunities to serve. Headquartered in the United States, the HandsOn Network numbered 250 volunteer centers across 16 countries in 2010; it reported partnering with more than 70,000 nonprofit organizations to engage more than 3 million volunteers in 30 million hours of volunteer service valued at over \$626 million in that year alone (Points of Light Institute, 2011).

Cross-nationally, volunteer center structure and funding vary greatly depending on historical, economic, governmental, and other factors. Some volunteer centers are nongovernmental or nonprofit organizations, while others are operated or supervised by local, regional, or national governments (de Palma and Paganin, 2002). In Europe, government continues to be involved in volunteer services often because volunteering is seen increasingly as a means of service provision and civic participation (Hilger, 2006, 2008; Bos, 2008a, 2014), or as a means of mobilizing civic and voluntary resources in social policy (Lorentzen and Henriksen, 2011). Volunteer centers have recently been described as a 'third party model' (Haski-Leventhal *et al.*, 2009) 'in which it is no longer the exclusive responsibility of voluntary organizations to recruit volunteers and encourage volunteering, but increasingly a matter for governments, corporations and educational institutes' (Lorentzen and Henriksen, 2011, p. 1).

Around the world, volunteer centers confront challenges in regard to obtaining sufficient staff and funding, integrating diverse community expectations, determining the purpose and activities of the center, protecting the organization from mission drift, and adapting to new technology such as the Internet (Osborne, 1999; de Palma and Paganin, 2002; Henriksen, 2008; Ellis, 2010). Despite the large number of volunteer centers, most have access to few resources, depending heavily on volunteers for staffing (Bos, 2014). Brudney and Kim (2003) found that among the volunteer centers responding to a Points of Light Foundation survey, the average center had three full-time employees and two part-time employees; over half employed only one or fewer full-time employee and one or fewer part-time employee. Henriksen (2008, p. 12) describes the struggle of volunteer centers for 'organizational identity', or for public understanding of where the organization exists in relation to the public, private, and nonprofit sectors, and 'public legitimacy', which is public recognition of the value of the

organization. As we describe in the following, although volunteer centers differ cross-nationally, South Korean volunteer centers encounter the same challenges, as well as support, as volunteer centers in other countries (Gweon, 2011).

## **Model and hypotheses**

Volunteer centers may perform a variety of activities cross-nationally, but their common function is to mobilize volunteers for placement in the community. Available to us are two measures pertaining to the amount of volunteers mobilized by the volunteer center: the number of people who have registered to serve as volunteers with the center since it began operations (Registrants) and the number of new recruits to the volunteer center in 2010 (Recruits). Brudney and Meijs (2009) refer to such aggregate quantities as ‘volunteer energy’, ready to be transformed into purposeful activity; here we use the term “Volunteer Involvement.” Unfortunately, measures of the impact or effects of this mobilization on organizations, clients, or the volunteers themselves are not available in South Korea – or any other country.

As shown in Figure 8.1, the explanatory model of volunteer center involvement includes three components: the environment of the center, the organization itself, and its volunteer program. The “Environment” comprises population density of the city or region in which the volunteer center is located, the number of beneficiaries of public support in this region, the number of organizations requesting volunteers from the volunteer center, and the auspices of the volunteer center (such as whether it is operated by a nonprofit organization or by government). The “Organizational” component encompasses the annual budget (2010) of the volunteer center, whether the center raises any of its own revenue, whether it extends requests for proposals (RFPs) for center improvement, and the age of the volunteer center. The “Volunteer Program” component includes the average per cent of time devoted by volunteer center personnel to volunteer administration, the number of incentives (tangible and intangible) the volunteer center provides to volunteers, volunteer center recruitment activities, and the number of times the center publishes a newsletter each year. In the following, we discuss these components in turn.

### **Environmental characteristics of the volunteer center**

With regard to the environmental component, the Corporation for National and Community Service (2010) reported in its pooled US data

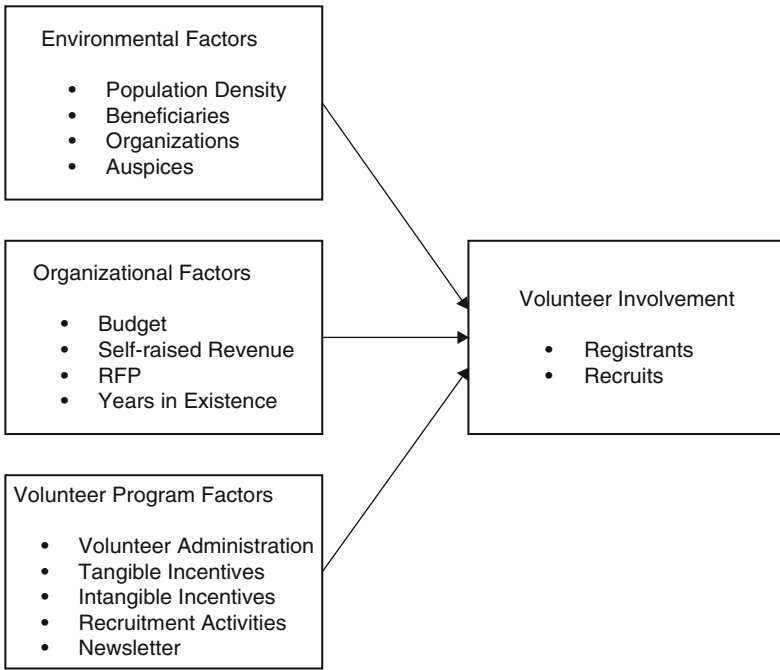


Figure 8.1 Model of citizen involvement in volunteer centers

for 2007–9 that urban areas have the lowest volunteer rate, rural areas have the highest, and suburban areas fall in between. Some scholars observe that controlling for sociodemographic differences, urban and suburban areas have slightly lower rates of volunteering than rural areas (Musick and Wilson, 2008), and more densely populated areas are less conducive to volunteer work (Vaillancourt, 1994; Day and Devlin, 1996; Kim and Hong, 1998; Putnam, 2000; Carlin, 2001). Haddad (2004), however, noted that although some research indicates that people in areas with lower population density volunteer more, other research found no significant difference in volunteer rate due to population density. We should also note that much of the literature is based on volunteer rates and volunteering in general, whereas we examine numbers of volunteers to volunteer centers. In South Korea, the source of the present data, Lee (2001) found that low population density had a negative correlation with participation in a volunteer center (that is, more densely populated areas had a higher rate of participation). Thus, our

first hypothesis proposes that volunteer centers located in areas with higher population density will have greater volunteer involvement, as reflected by volunteer registration and recruitment for the year 2010 (Hypothesis 1).

According to Musick and Wilson (2008, p. 324), areas with greater need and economic deprivation tend to produce less volunteer activity. People in these areas may lack the resources or motivation to volunteer in their community. Other studies support this correlation (Osborne *et al.*, 2008; Taniguchi, 2010). We acknowledge that lower expectation for low-income groups to volunteer through volunteer centers may reflect greater informal volunteering and help to neighbors, friends, and families in need, but we do not have data available to control for how informal volunteering may affect enrollment in volunteer centers. We therefore hypothesize that the greater the proportion of beneficiaries of public support in a region, the lower the rate of volunteer involvement at its volunteer center (Hypothesis 2).

Another likely determinant of volunteer activity is the demand on a volunteer center for volunteers. We conceive of the number of organizations that request volunteers as a measure of this demand. To accommodate greater demand, volunteer centers are likely to recruit more volunteers to meet the needs of client organizations. Indeed, we talked with officials in the South Korea National Volunteer Center, who assured us that most requests for volunteers originate from organizations that need volunteer help. On receiving such requests, volunteer centers screen their applications and visit the organizations to evaluate if they are appropriate placements for their volunteers. We propose that volunteer centers that receive more requests from organizations for volunteers will have higher rates of volunteer involvement (Hypothesis 3).

Based on a survey of 142 South Korean volunteer centers, Oh (2000) found that whether the volunteer center was operated by government or by a nonprofit agency had no correlation with the number of registered volunteers. Yet, nonprofit organizations are commonly viewed as more flexible and responsive to public needs than government (Salamon, 1999). Conversely, volunteer centers operated by government may experience higher levels of bureaucratization; for example, complex procedures and bureaucracy led to problems and delays in funding for government-operated volunteer centers in Italy (de Palma and Paganin, 2002). Volunteer centers operated by nongovernmental organizations may be subject to fewer, and less stringent, regulations that can impair the performance of government-run volunteer centers. Because greater flexibility and responsiveness, coupled with fewer regulations, may

attract more volunteers, we hypothesize that volunteer centers operating under nonprofit auspices will have higher rates of volunteer involvement than government-operated volunteer centers (Hypothesis 4).

### **Organizational characteristics of the volunteer center**

Next, we propose hypotheses pertaining to the effects of important organizational characteristics on citizen involvement in volunteer centers. Oh's (2000) survey of South Korean volunteer centers finds that the amount of annual budget, an indicator of resources, is positively related to the number of registered volunteers. Hager and Brudney (2004b) explain that nonprofits with larger budgets are more likely to implement "best practices," such as training and recognition commonly thought to increase volunteer involvement. Following Hager and Brudney (2004b) and Oh (2000), we hypothesize that the greater the resources of the volunteer center (as determined by budget), the higher the level of volunteer involvement (Hypothesis 5).

Lee (2001) reports that support for the volunteer center by mayors and the community had a positive effect on volunteer recruitment and placement in South Korea. Communities and individuals that are supportive of volunteer centers are more likely to contribute to them financially. We thus view self-raised revenue as an indicator of a volunteer center's engagement and connection with the community and as a positive factor in its ability to recruit and place volunteers. Additionally, volunteer centers that are able to raise a portion of their own funding may have more vibrant leaders who succeed in advancing the goals of the center, also attracting more volunteers. In sum, we propose that volunteer centers that raise more money through their own fund-raising will have higher rates of volunteer involvement (Hypothesis 6).

Some volunteer centers in South Korea issue a RFP with the purpose of stimulating ideas to improve the operations of the organization and its volunteer programs. We consider this activity a proxy for the "quality" of the volunteer center leadership. By extending RFPs, volunteer center leaders signal their interest in center performance and improvement. We propose that volunteer centers that issue such RFPs will be more concerned with achieving organizational goals, which will be manifest in greater numbers of registrants and recruits to the center (Hypothesis 7).

Volunteer centers that have existed for a longer time are likely more established in the community and have a more stable volunteer base. People are more likely to volunteer with a well-known, reputable organization. Conversely, newer and start-up volunteer centers may be

struggling to become part of the community. For this reason, we expect that older volunteer centers will have higher rates of volunteer involvement (Hypothesis 8).

### **Volunteer program characteristics of the volunteer center**

The final set of hypotheses in our explanatory model concerns features of the volunteer program. In past research, the per cent of time devoted by the administrator of volunteer services to the volunteer program is strongly associated with program effectiveness (Brudney, 1999). Hager and Brudney (2004a) find that organizations that devote more resources to volunteer management reap greater benefits from volunteers. They show that charities whose directors of volunteer services devote a greater percentage of their work time to the volunteer program are able to take on more volunteers (Hager, 2004). In addition, charities with a paid staff member who devotes at least two-thirds of her or his work time to volunteer administration reported the highest net benefits from volunteers (Hager and Brudney, 2004a). Other literature acknowledges the importance of recording time spent by paid staff on volunteer administration (Goulbourne and Embuldeniya, 2002) and suggests that this figure is a highly useful indicator of the volunteer management capacity and support of the organization (UPS Foundation, 2002). Following this research, we hypothesize that volunteer centers in which staff members dedicate a greater percentage of their time to volunteer administration, as opposed to paperwork and other official business, will have a higher rate of volunteer involvement (Hypothesis 9).

Our next set of hypotheses proposes that volunteer centers that offer more tangible as well as intangible incentives to volunteers will be rewarded with greater volunteer involvement. The South Korea National Volunteer Center collects data on two tangible incentives, the "volunteer (membership) card" (used for discounts at stores, reduced admission to parks and museums, and so on) and the "mileage card" (similar to the volunteer card), and two intangible incentives, "excellent volunteer training" (training offered to highly active volunteers) and awards or recognitions for volunteering. Scholars find that the duration of volunteer activity for older adults is negatively related to incentives offered (Tang *et al.*, 2009), and that monetary incentives offered for altruistic action can decrease participation (Brekke *et al.*, 2003). Carpenter and Myers (2010) and Glenton *et al.* (2010) report that offering certain extrinsic incentives can affect volunteers' concern for their reputation or "image" as volunteers. By contrast, Musick and Wilson (2008) acknowledge that at times, material incentives can attract individuals to volunteer, and



Strelow *et al.* (2002) found that volunteers who received incentives were more active than those who did not. Although the evidence is mixed, we hypothesize that volunteer centers that offer tangible incentives to their volunteers will have higher rates of volunteer involvement (Hypothesis 10a). Regarding intangible incentives, research finds that volunteer recognition by nonprofit organizations is positively related to volunteer retention (Grossman and Furano, 2002; Hager and Brudney, 2004b) and may increase satisfaction with volunteer work (Gazley and Dignam, 2008). Providing training for volunteers is also associated with retention (Hager and Brudney, 2004b). Therefore, we hypothesize that volunteer centers that offer more intangible incentives will likely have higher rates of volunteer involvement (Hypothesis 10b).

Volunteer centers that conduct more recruitment activities likely have greater visibility in the community and are able to attract more volunteers. Recruitment typically takes the form of asking people to volunteer, which is recognized as the most effective technique (Musick and Wilson, 2008). In the United States, those who are asked to volunteer are four times more likely to volunteer than those who are not (Bryant *et al.*, 2003). We propose that volunteer centers that have a suborganization (which primarily serves recruitment purposes) and conduct recruitment activities such as campaigns, programs, events, and so on, will likely have higher rates of volunteer involvement (Hypothesis 11).

Scholars and practitioners routinely encourage host organizations to provide support for their volunteers (for example, Rochester *et al.*, 2010; Ellis, 2010). One way of providing support is through communication, such as distributing a newsletter. A newsletter may lead the volunteer to feel more connected with the organization and its activities. Brudney (1999) found in a sample of US government agencies that disseminating a newsletter to volunteers was correlated with the perceived benefits of volunteer involvement. We hypothesize that the more often a volunteer center prepares and distributes newsletters each year, the greater the anticipated volunteer involvement (Hypothesis 12).

## Methods

To evaluate empirically the proposed model of citizen involvement in volunteer centers and the associated hypotheses, this chapter uses data collected in 2010 from South Korean volunteer centers. The South Korea Ministry of Public Administration and Security oversees a total of 232 local volunteer centers. The Ministry contracts with the National Volunteer Center, a nonprofit organization, to collect data from the

volunteer centers on an annual basis.<sup>1</sup> As of 2009, volunteer centers in South Korea had 5,363,435 registered volunteers (Gweon, 2011).<sup>2</sup>

## **Background**

South Korea has a strong tradition of many kinds of informal volunteering and helping behavior (Lee, 2002; Gweon, 2011; United Nations Volunteers, 2011). As the country modernized, formal volunteering expanded, beginning in the 1960s and continuing with greater participation in many volunteer movements, including the Red Cross, community development initiatives, and the Olympic Organizing Committee (Gweon, 2011). The first volunteer center in South Korea was established in 1987 by a nonprofit organization (Gweon, 2011). Since 1996, the Ministry of Government Administration and Local Autonomy (which has been renamed the “Ministry of Administration and Security”) has supported the opening of nearly 250 volunteer centers across South Korea (Lee, 2002).

In 2006, the South Korean government enacted the Basic Act on Volunteer Services (Government of South Korea, 2006) to promote volunteerism, in part through volunteer centers. The act established means to manage the growing volunteer efforts in South Korea by defining the activities of formally organized volunteer centers that report to national and local governments (United Nations Volunteers, 2011). The act made local volunteer centers responsible for developing a cooperative framework with local organizations and groups, recruiting and educating volunteers, promoting volunteer service, matching volunteers to other organizations, developing volunteer programs, collecting and distributing information about volunteering, and performing other projects related to volunteer services (Lee, 2009).

Although volunteer centers in South Korea tend to be relatively well established, they suffer from the same difficulties encountered by volunteer centers in other countries. These problems include high levels of financial dependence on government and bureaucratic administration, and limited training for volunteer management professionals (Gweon, 2011). According to Bos (2014), volunteer centers in other countries face similar challenges, such as a lack of resources and funding concerns, and complex relations and expectations of diverse stakeholders (Fryar *et al.*, 2001; Henriksen, 2008; Ellis, 2010).

## **Variables**

Table 8.1 summarizes the variables used in the analysis, including descriptive statistics. As mentioned earlier, the dependent variables

consist of two measures of volunteer involvement in the volunteer center: *Registrants* is the total number of volunteers registered with the volunteer center as of 2010. *Recruits* is the number of individuals recruited to the volunteer center in 2010.<sup>3</sup>

As elaborated in Table 8.1, the explanatory model consists of three categories of explanatory variables associated with the Environment, the Organization, and the Volunteer Program of the volunteer center. With respect to Environmental factors, *Population Density* refers to the designations used by the South Korean government for categorizing areas: *gun* (county), *si* (city), and *gu* (district) (National Geographic Information Institute, 2007). Areas are categorized as *gu* if they have populations over 500,000, as *si* if the population is between 150,000 and 500,000, and as *gun* if the population is less than 150,000. We created a dummy variable to measure whether the volunteer center was located in a *gu* (1) versus a *si* or *gun* (0). *Beneficiaries* is the number of people per 1,000 residents living in an area who, based on their income, receive an allowance from the government for daily living costs, housing, education, maternity costs, funeral costs, and health care. *Organizations* measures the number of organizations that the volunteer center reported had contacted it to request volunteers. *Auspices* measures whether the volunteer center is contracted to a nonprofit or independent organization (1) or operated by the government (0).

We next describe the Organizational factors. *Budget* measures the volunteer center's 2010 budget in thousands of South Korean won. *Self-raised Revenue* refers to whether the volunteer center has self-generated revenue (1) or not (0). The variable *RFP* measures whether the volunteer center issues a RFP for improvements in the center or its volunteer program (1) or not (0). *Years in Existence* measures the longevity of the volunteer center in years.

The first Volunteer Program factor is *Volunteer Administration*, operationalized as the average estimated per cent of time volunteer center employees devote to volunteer administration.<sup>4</sup> Volunteer centers can offer *Tangible Incentives*, such as a volunteer (membership) card or a mileage card. They can also offer *Intangible Incentives*, including awards for volunteering and "excellent volunteer" training for completing a certain number of hours of volunteer service. Each of these measures ranges from zero (no incentives offered by the volunteer center) to a maximum of two.

*Recruitment Activities* measures whether or not the volunteer center operates suborganizations, which are typically used for purposes of volunteer recruitment, and/or carries out additional recruitment activities

Table 8.1 Variables used in the analysis<sup>a</sup>

Variable name	Variable measurement	Descriptive statistics <sup>b</sup>			
		Minimum	Maximum	Mean	Standard deviation
Volunteer involvement					
Registrants	Number of volunteers registered with the VC <sup>c</sup> (ln)	5.81	12.09	9.77	0.98
Recruits	Number of individuals recruited to the VC in the last year (ln)	3.64	9.97	7.81	1.15
Environmental factors					
Population Density	Large region ( <i>gu</i> ) or smaller region ( <i>si</i> or <i>gun</i> ) ( <i>gu</i> = 1, <i>si/gun</i> = 0)	0	1	0.30	0.46
Beneficiaries	Number of people per 1,000 residents receiving public assistance	6.19	89.53	38.84	18.22
Organizations	Number of organizations that contacted VC for volunteers (ln)	0	7.92	4.48	1.82
Auspices	Contract with nonprofit organization or government-operated (contract = 1, government = 0)	0	1	0.36	0.48
Organizational factors					
Budget	Budget of VC (in 1,000 Korean won) (ln)	10.89	13.99	12.21	0.63
Self-raised Revenue	Revenue raised by the VC (yes = 1, no = 0)	0	1	0.22	0.42
RFP	The VC issues a RFP (yes = 1, no = 0)	0	1	0.22	0.41
Years in Existence	Number of years VC has been in existence	3	20	11.64	3.05
Volunteer program factors					
Volunteer Administration	Average per cent of time devoted to volunteer administration by all employees	70	100	90.52	6.01
Tangible Incentives	Volunteer (membership) card, Mileage card	0	2	1.29	0.808
Intangible Incentives	Excellent volunteer training, Volunteering award	0	2	1.40	0.694

(continued)

Table 8.1 Continued

Variable name	Variable measurement	Descriptive statistics <sup>b</sup>			
		Minimum	Maximum	Mean	Standard deviation
Recruitment Activities	VC recruits through suborganizations and/or has recruitment activities such as campaigns, events, and special programs (VC does both = 2, one only = 1, none = 0)	0	2	0.66	0.71
Newsletter	Number of newsletters distributed in past year	0	28	7.37	6.95

<sup>a</sup>All data for 2010.

<sup>b</sup>*N* = 225 cases (volunteer centers) with complete data on all variables.

<sup>c</sup>VC = volunteer center.

Source: National Volunteer Center, South Korea.

such as campaigns, programs, and events in addition to the annual festival that nearly all volunteer centers hold. The measure takes the following values: 0 (neither suborganizations nor additional recruitment activities), 1 (either suborganizations or additional recruitment activities), or 2 (both suborganizations and additional recruitment activities). Finally, *Newsletter* measures the number of times per year the volunteer center publishes a newsletter.

## Findings

Table 8.1 presents the descriptive statistics for all variables used in the analysis. Of the total of 232 local volunteer centers in South Korea, 225 have complete data for these variables. In order to attend to outliers in the data, the dependent variables (Registrants and Recruits), the number of organizations that contacted the volunteer center to request volunteers (Organizations), and the volunteer center budget were transformed to their natural log form (ln).

Table 8.1 reveals the heterogeneity of the South Korean volunteer centers. Thirty per cent of the volunteer centers are located in a large region (*gu*), and 36 per cent are operated by a nonprofit or independent organization (contracted). The average volunteer center has been in existence for almost 12 years (mean = 11.64 years), with a life span across volunteer centers ranging from 3 to 20 years. Twenty-two

per cent of the volunteer centers do some fund-raising on their own, and the same percentage (22 per cent) issue RFPs for improvement of center performance. Across the volunteer centers, employees devote, on average, a reported 70 per cent (minimum) to 100 per cent (maximum) of their time to volunteer administration. The typical volunteer center offers an average of more than one tangible incentive (mean = 1.29) and one intangible incentive (mean = 1.40) to volunteers. With regard to recruitment activities (including having suborganizations), nearly half of the volunteer centers (48 per cent) neither have a suborganization(s) nor conduct additional recruitment activities, almost 40 per cent (37.8 per cent) have either suborganizations or recruitment activities, and about 15 per cent (14.2 per cent) have both. On average, the volunteer centers publish a newsletter approximately seven times a year (mean = 7.37); about 70 per cent publish a newsletter monthly or less often (72 per cent), and the remaining 28 per cent publish more frequently (just 8 per cent,  $N = 19$ , of the volunteer centers do not publish a newsletter).

To begin our empirical analysis of our model of citizen involvement in volunteer centers, we first examined the correlation coefficients between the dependent variables – Registrants (the number of people registered by the volunteer center to serve as volunteers) and Recruits (the number of new recruits to the volunteer center in 2010) – and the explanatory components: Environmental factors, Organizational factors, and Volunteer Program factors. The correlation coefficients provided (bivariate) support for nearly all of our hypotheses, which we examine more rigorously in a multivariate analysis.<sup>5</sup>

We use multiple regression analysis to assess the overall performance of the explanatory models and the individual predictors (Figure 8.1). Table 8.2 presents the findings. As might have been anticipated based on the strong bivariate (correlation) results, these multivariate models yield substantial explained variation, with *R*-squared (and Adjusted *R*-squared) values of 0.654 (0.632) for Registrants and 0.558 (0.531) for Recruits. Thus, our regression models can explain more than half of the variation in citizen involvement in volunteer centers in our sample, and as much as 60+ per cent.

Turning to the individual effects, with but two exceptions we find that the same explanatory variables are associated at a statistically significant level with the number of Registrants and the number of Recruits to volunteer centers. With respect to the influence of the Environmental factors, as hypothesized, the results show that volunteer centers in areas with greater population density are more successful in registering and recruiting volunteers. Also as hypothesized, volunteer centers in areas

Table 8.2 Multiple regression analysis: slope coefficients (*b*) for the estimated models<sup>a</sup>

Independent variables	Dependent variables <sup>b</sup> (volunteer involvement)	
	Registrants	Recruits
<b>Environmental factors</b>		
Population Density	0.422****	0.392**
Beneficiaries	-0.012****	-0.013****
Organizations	0.129****	0.150****
Auspices	0.186*	0.287**
<b>Organizational factors</b>		
Budget	0.460****	0.416****
Self-raised Revenue	0.004	0.146
RFP	0.035	0.185
Years in Existence	0.057****	0.025
<b>Volunteer program factors</b>		
Volunteer Administration	0.012*	0.017*
Tangible Incentives	0.026	0.158**
Intangible Incentives	-0.007	-0.123
Recruitment Activities	0.121*	0.154**
Newsletter	0.000	0.006
R-Squared/Adjusted R-squared	0.654/0.632****	0.558/0.531****

<sup>a</sup>All data for 2010.

<sup>b</sup>N = 225 cases (volunteer centers) with complete data on all variables.

(\*\*\*\*) Statistically significant at 0.001 level; (\*\*\*) statistically significant at 0.01 level; (\*\*) statistically significant at 0.05 level; (\*) statistically significant at 0.1 level.

Source: National Volunteer Center, South Korea.

with greater need and economic deprivation, as indicated by the number of beneficiaries of public assistance per 1,000 people, do less well in involving volunteers (although we cannot test whether these areas have higher rates of informal volunteering). By contrast, volunteer centers with greater demand for volunteers, as measured by the number of organizations requesting them, have both more Registrants and more Recruits. As we had expected, volunteer centers that are contracted out to nonprofit organizations (auspices) fare better than their government-operated counterparts in netting both Registrants and Recruits.

The Organizational factors included in the model do not offer as persuasive an explanation of volunteer involvement at the volunteer centers. As hypothesized, volunteer centers with larger budgets are able to attract more Registrants and Recruits. However, volunteer centers that raise some of their own revenue, or that issue RFPs for their own

improvement, are no more successful than the other volunteer centers in involving volunteers (the signs are in the predicted direction, but the coefficients do not attain statistical significance). Volunteer centers that have been in existence for a longer time have more Registrants, but not more Recruits. Since the Registrant list counts all volunteers from the inception of the volunteer center while recruits include only those who joined in the past year (2010), we would expect a stronger relationship to the former.<sup>6</sup>

The final set of explanatory variables consists of Volunteer Program factors. Contrary to our expectations, offering intangible incentives to volunteers, and publishing a newsletter at frequent intervals, does not seem to affect the number of either Registrants or Recruits to volunteer centers. By contrast, offering tangible incentives to volunteers does seem to raise the number of Recruits (but not Registrants), thus suggesting that their effect is more immediate. As expected, volunteer centers that make greater provisions for recruiting volunteers through suborganizations or additional recruitment activities are more successful in gaining both Registrants and Recruits. As past research suggested, devoting more staff time to administration of the volunteer program is reflected in increases in the number of Registrants and Recruits to the volunteer center.

## Discussion

The above-mentioned findings raise several issues. First, the Environmental factors have consistent effects on citizen involvement in volunteer centers. Volunteer centers serving areas with higher population density but fewer beneficiaries of public assistance (per 1,000 people) can be expected to attract and recruit more citizens into volunteering. Similarly, when demand for volunteers is high (as indicated by the number of organizations making requests for volunteers), volunteer centers are more successful. We cannot determine from these data whether the volunteer centers stimulate this demand through their performance or respond to it – or both. An important implication for public policy derived from our analysis is that volunteer centers operated under nonprofit rather than government auspices perform better in involving volunteers.

Our model is less helpful in understanding the effects of the Organizational factors on attracting volunteers to volunteer centers. Only the amount of budget reveals the predicted effect of increasing both Registrants and Recruits to volunteer centers. Surprisingly, in



the multivariate analysis, neither raising some of its own revenue nor issuing RFPs for volunteer center improvement is related to increasing the level of volunteer involvement. We had anticipated that these variables might serve as proxy measures of the immersion of the volunteer center in the community or the quality of its leadership, but perhaps the measurements are too gross to capture these effects. As explained earlier, it is quite understandable that (longer) age of the volunteer center would be associated with the number of Registrants (as shown in Table 8.2). Analogous to the earlier findings, however, the fact that age is not related to the number of Recruits to the volunteer center in the past year suggests that it, too, is not a proxy measure of the community immersion or leadership quality of these entities.

The Volunteer Program factors demonstrate greater explanatory power. As we had expected, giving attention to the volunteer program, as reflected in the per cent of employees' time devoted to volunteer administration, pays dividends with respect to increased citizen involvement in the volunteer center. Recruitment activities have the same result. Despite the value of a newsletter for keeping volunteers in touch, publishing a newsletter at more frequent intervals is not related to attracting Registrants or Recruits. As our literature review might have suggested, offering tangible and intangible incentives to volunteers has paradoxical effects for the volunteer centers; the only finding to attain statistical significance is that providing more tangible incentives may net more Recruits to the volunteer center. In sum, the findings suggest that we can understand the broad contours of volunteerism, such as the environmental factors, better than the more proximate factors of the organization and the volunteer program.

## **Conclusion**

Although volunteer centers exist in over 60 countries and affect thousands of organizations and millions of people, little research has attempted to understand their performance. We take a first step in this chapter. Based on the relevant literature, we proposed a model of volunteer center performance consisting of factors pertaining to the environment, organization, and volunteer program of these units. We conceived volunteer center performance according to its core function, involving volunteers, measured by the number of volunteers it has registered for service in their communities and the number recruited to the center in the past year. We tested the model empirically using data from South Korean volunteer centers for 2010. The findings yielded

strong support for the hypothesized relationships, especially for the role of environmental versus organizational and volunteer program factors. This model and these results can advance the study and performance of volunteer centers worldwide.

This inquiry is an initial one into volunteer center performance, and, as a result, it leaves open important questions for further research. First, the study is based on volunteer centers in one country, even though these infrastructure organizations exist around the world. Our literature review suggested that volunteer centers in South Korea face the same issues and challenges as those in other countries, but research should be extended beyond this setting. Second, this inquiry dealt exclusively with volunteer centers, so that it examined only one type of volunteer-involving organization. Additional research is needed to determine the extent to which the findings of our inquiry may apply to other types of organizations that involve volunteers, such as more traditional volunteer-based service delivery organizations including libraries, schools, recreation centers, associations, and cooperatives.

Finally, further research is needed to examine and understand the differences between volunteer involvement and activation into service. Registering and recruiting people so that they are involved with the volunteer center increases the likelihood that they will volunteer, but it is not the end point of having volunteers: the effort expended in attracting large numbers of volunteers who are registered or newly recruited must be harnessed in placing them in service projects or activities. The goal of having these valuable human resources is to motivate or activate them into services and other projects to benefit communities, clients, organizations, and the volunteers themselves. Not only for volunteer centers but also for other volunteer-involving organizations, this question is a crucial one for continuing research and practice.

## **Acknowledgments**

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## **Notes**

1. The South Korea National Volunteer Center collected annual data from the local volunteer centers by an electronic survey for the year 2010. Officials at the National Volunteer Center checked the data for unreliable responses and

corrected them when necessary. The Ministry of Public Administration and Security (2011) published some of these data in a 2011 report entitled *State of the Volunteer Centers in 2010*. In our analysis, we use data published in the 2011 report when available and otherwise rely on the electronic database.

2. The South Korea National Volunteer Center operates a web service called the 1365 Volunteer Portal Website, a comprehensive (integrated) database comprising local and nationwide volunteering activation data. This website prevents double counting of people moving by sharing volunteer information. However, the 1365 website allows people to register more than one time with different IDs. Such double counting is a limitation of these data.
3. In 2010, three cities in the volunteer center database merged into one. Although the volunteer centers remain separate, we only have aggregate data for certain variables. For three of the variables (Registrants, Recruits, and Population Density), we used the proportions from 2009 to estimate the corresponding numbers in the aggregate 2010 data. For these three cities, we obtained the number of beneficiaries of public assistance from the South Korea Ministry of Health and Welfare.
4. Respondents to the annual volunteer center survey estimated the percentage of time center employees spent on each of the following ten functions: finding organizations that need volunteers, program development, recruiting volunteers, counseling volunteers, training volunteers, replacing volunteers and planning events, finding or implementing incentives, networking, researching, and performing "official matters" (accounting, paperwork, and so on). The National Volunteer Center specifies these employee functions. Because all save "official matters" relate directly or indirectly to volunteer management, we subtracted the average percentage of time center employees reported spending on "official matters" from 100, thus leaving the per cent of time staff members spent on areas relating to *Volunteer Administration*.
5. The matrix of bivariate correlations is available from the authors.
6. Each volunteer center removes the names of the deceased from the list of Registrants if their deaths have been reported to the volunteer center. In addition, volunteer centers annually remove these names by connecting with the Korea Population Census Bureau. Missing persons cannot be removed from the Registrant list, however. If Registrants to serve as volunteers have not participated in volunteer work for ten years, the 1365 Volunteer Portal Web Service automatically removes them from the list of Registrants.

# 9

## Participatory Administrative Procedure: USA vs. Selected EU States

*Polonca Kovač and Tina Sever*

### Introduction

In a classic sense, administrative procedure is primarily a way in which the parties that are the bearers of legally recognized interests assert such interests on an operational level. In such a context, administrative procedure is also a tool to ensure the democratic nature of relations between the authorities and their subjects, allowing the parties to defend themselves whenever the authorities unjustly refuse to recognize certain rights or impose (too many) obligations without due legal basis. In order to avoid such occurrences, the parties – being in an a priori subordinate position in their relation with the authorities – enjoy several procedural safeguards already in the course of the procedure itself. However, new elements have recently emerged in administrative relations, such as the transfer of sovereign state powers to the European Union, privatized implementation of public tasks outside direct state administration, and the delegation of value-based decision making from (once only) parliament to lower authorities. These elements all call for new methods of public governance (Barnes, 2011, p. 339). Since administrative procedures are considered a typical tool, manner, or method to implement public policies, they need to keep up with these changes, as the method should follow the content. Moreover, the administrative procedure is also a tool used to fulfill the mission of administrative institutions and, as such, a key element for evaluating the effectiveness of the system and identifying possible improvements. New institutions have thus evolved in the regulation and implementation of administrative procedures that attempt to balance the need to protect the constitutional rights of the parties with the need for administrative rationality. Both rulemaking and implementation – that is, the

main activities of institutional and instrumental public governance – form the basis of important concepts of modern society, principally good governance and good administration. The latter, particularly in national public law, is primarily reflected in the procedural rights of defense (Venice Commission, 2011).<sup>1</sup> A sufficient and clear regulation is certainly a key foundation of effective and responsible administrative decision making, which, on one hand, strives to promote public interest while, on the other, represents a procedural tool to protect the rights of the parties in their relation with the administration or authorities. Regulations do not apply per se. Taking into account the complexity of modern social life and diverging interests between the parties, it is necessary to establish for each individual case whether and which general rules apply in a given situation.

In order to ensure a minimum uniform level of protection of the rights of the parties in all areas of administration, most countries have adopted an Administrative Procedure Act (APA), the purpose of which is a subordinate yet standardized application of the main APA safeguards in various administrative matters. These acts are, as a rule, statutory laws, their subject matter complying with the German and Francophone constitutional tradition of defining the rights and duties of individuals, particularly in their relations with the authorities. Only law can provide for the predictability of relations (the principle of the rule of law, *Rechtsstaat*; see Ringeling in Chapter 3).<sup>2</sup> Thus, the administrative procedure is a fundamental instrument of the rule of law and democracy, particularly in relation to the protection of the constitutional rights of individuals from possible abuse of power by administrative bodies (McCubbins *et al.*, 2007, p. 19).

This chapter compares the regulation of individual institutions of administrative procedure in the United States, representing the Anglo-Saxon system, and Germany, Austria, and Slovenia,<sup>3</sup> representatives of the Continental-European system. The contribution hypothesizes that regulations in selected states converge despite the different legal traditions and economic settings of individual countries and systems, while, on the other hand, the said differences reduce the rate of global convergence. In defining development, the authors draw from the idea that the regulation of administrative procedure should promote openness, accountability, and effectiveness of public administration, encouraged by the development of participation and understanding of administrative procedures in a broader sense. The chapter, therefore, supports the paradigm of the participatory state wherein greater emphasis in regulation is placed on flexibility with the basic legal principles as value

criteria. The analysis is focused on a comparison of selected institutions of administrative procedure in countries belonging to two different legal systems, that is, the central continental (German-oriented) system and the Anglo-Saxon system (in the USA). The research question is to what extent authority should be participatory to maintain the effectiveness and efficiency of public administration. The chapter examines, in particular, the regulatory framework and trends concerning the principle of participation (*audi alteram partem*) as the foundation of the rights of defense. The findings offer a comparative overview of selected institutions in respective countries, and the chapter concludes with a critical assessment with final *de lege ferenda* insights.

### **The role of APA regulation and implementation in the administration of public affairs**

In the light of the ever more complex way of living, globalization, and crises related to limited resources, the administration of public affairs is becoming increasingly important, both in general and in administrative, rather static legal relations. The dynamics of the social environment require a response. The holders of public powers should proactively and systematically direct the interactions between different parties in a manner such as to resolve and prevent conflicts, thus ensuring overall welfare, by either authoritative or nonauthoritative administrative actions.<sup>4</sup> Between the 18th and the 20th century, public law evolved into a restrictor of authoritative self-will and abuse of power, even in administrative procedures where administrative acts concern the individual's legal position toward the authorities. In such context, administrative law represents the operationalization of the constitutional guarantees of individuals.<sup>5</sup> Administrative procedure implies an ordered and schematic course of activities intended to lead or contribute to a specific goal, whereby the latter is not yet fully determined at the beginning of such procedure and goal displacement is still possible. The purpose of the procedure is, hence, to mitigate the uncertainties regarding the goal, considering that uncertainty is a component of any problem-solving procedure (cf. Schmidt-Assmann in Hoffmann-Riem *et al.*, 2008, p. 488). Since the administrative relation is by its nature unilateral, the APA is intended to protect the weaker party in its relation toward the administrative body or authority by means of the principle of legality, that is, by the authorities being bound to applicable and publicly known law. Thereby, the APA ensures predictability and simultaneously provides for an effective regulation of the

aforementioned relations. The same applies in terms of development, as the need for regulating administrative procedures is mostly based on a primary provision of legality, impartiality, the rights of defense, and similar, which makes convergence in the (meta)regulation and content of administrative procedures barely a surprise (cf. Craig, 2005, p. 270; Statskontoret, 2005, p. 73; Rusch, 2009, p. 4; Galleta, 2010). Yet in most Continental countries, or so-called “German-oriented” states,<sup>6</sup> the administrative procedure is at least partially codified by a general law, while in other countries it is regulated by sector-specific acts or codes. More frequently, following the US tradition, other procedures and relations between the administration and private parties are being defined in a uniform manner, or at least on the basis of participative democracy, as well. However, as stressed by, for example, Barnes (2011, p. 338), such classic distinction is – given the intertwining of regulatory and executive functions – becoming ever more blurred, at both the national and international levels.<sup>7</sup> Although this is an ongoing process, theory already distinguishes between two groups of administrative procedures (for example, Galligan *et al.*, 1998, pp. 17–26), in which both individualized administrative acts and public policies (policy-based decisions with general effect, regulatory acts, and rulemaking) are made.

From the viewpoint of political science, particularly in US theory (for example, Craig, 2005; McCubbins *et al.*, 2007), administrative procedures are examined as a consequence of or a tool for exercising state authority, both in terms of adopting general rules at the level of the administration and in terms of individual acts or administrative procedures as the key components of administrative reforms, along with the organization of authority and the civil service system (cf. Rusch, 2009, p. 4). On the other hand, in addition to private law relations, legal and administrative law science also examines the authoritative definition of relations between the parties in order to align their and other legally recognized interests.<sup>8</sup> But in both systems, the contemporary model of good governance is based on the exercise of authority with participative strategic partnerships in the economy and civil society. The theory outlines a system of governance based on soft law that is agreement-oriented and adopted in cooperation with public and private entities. Here, democratic reforms are conducted through networking and open structures rather than authoritatively from top to bottom (more in Schuppert, 2011, pp. 287–98). In such context, administrative procedure law should be developed by coregulation, allowing a consensual alignment of opposed interests. The evolution of public administration into a cooperative good administration is therefore both a tool and a

target by which and toward which the state can transform its public administration model and legal basis<sup>9</sup> from mere public administering to integral governance and societal progress (Eymeri-Douzans and Pierre, 2011, p. 8).

The US APA has in this respect evolved since its inception into one of the major democratic mechanisms by which individuals can assert their rights and obligations toward the authorities, particularly by ensuring increasing openness of administrative procedure. The milestones in the development of APA include adoption of statutes under the New Deal legislative plan (1933),<sup>10</sup> adoption of the APA (1946), amendment of the APA on the adoption of the Freedom of Information Act (1966), amendment of the APA based on the Sunshine Act on public sessions (1976), amendment of the APA on the introduction of negotiations under the Negotiated Rulemaking Act (1990), and amendment of the APA with the Administrative Dispute Resolution Act (1991) (more in Nylander, 2006, p. 40; National Conference of Commissioners on Uniform State Laws [NCCUSL], 2010). Each administrative body (that is, agency) must, in its activities (adjudication, rulemaking), comply with the APA, and the Congress often applies the APA as a reference for other laws. Likewise, the APA specifies the procedure of the US Federal Courts for direct judicial review of administrative acts adopted by federal agencies. The APA has a very broad meaning and a strong influence on the US public order (for example, social security or environmental protection; for more on this and purposes of the APA, see Nylander, 2006, p. 39).<sup>11</sup> It distinguishes two separate administrative procedures, namely, rulemaking (Sections 551–9) and judicial review (Sections 701–6). The contrast between the two is a process of defining past and future rights and obligations (more in Lubbers, 2004).

In European- and German-oriented states, the APA evolved in response to the police state, first with the Spanish APA of 1889 and later with the Austrian APA of 1925, although it only related to individual decision making. Recently, administrative procedure law – both APA and special sector-specific laws – has been undergoing changes, particularly under the influence of the development of the EU internal market, thus reversing the trend in the sense of restricting absolutist power and striving for easier implementation of public policies. The convergence measures or institutions applied in principle by all three selected German-oriented states under examination here include deregulation of administrative matters and simplified regulation of administrative procedures in order to reduce administrative burden; resolve disputes outside administrative procedure, for example, through mediation among



the parties (Pitschas, 2008a, p. 172); transfer of certain fair procedure safeguards among nonessential procedural errors (as in Germany; Künnecke, 2007, p. 152); technological revision of regulation and computerization (e-government); reduced deadlines for administrative acts and earlier enforceability, for example, by excluding appeal or instances for decision making, by nonsuspensive effects of legal remedies, or by renouncing the right of appeal; and so on (see in general Statskontoret, 2005, p. 34; for Slovenia, see Kovač, 2011, pp. 40–5).

An upgrading of the above dichotomy in defining general rules and issuing individual administrative acts exclusively with due consideration of the range of effects of issued administrative acts is offered – particularly in the light of the regulation and practice at the EU level – by Barnes (2011, pp. 350–4), who distinguishes three generations of administrative procedures. The first generation refers to individual procedures, including adjudication, based on the development of illuminated absolutism and the classic separation of powers since the 18th century, as (still) existing in German-oriented states. The second generation of administrative procedures comprises legislative procedures at the level of administrative bodies, national or, for example, European regulatory bodies, and coincides with the development of agencification and public–private partnerships. But the most important shift is observed in the third generation of administrative procedures. Based on the governance model, these third-generation procedures include both individualized and legislative procedures, as well as administrative participation in public policymaking.<sup>12</sup> In contrast to the first two defense-oriented generations, the third generation focuses on creative partnerships between social groups and thus on greater legitimacy of public policies or individual administrative acts and represents a system of communication between the rulers and the ruled.<sup>13</sup>

Administrative procedure is thus necessarily a trade-off between effectiveness and fair outcome (Nehl, 1999, p. 11; Statskontoret, 2005, p. 78). Such dual perception of the administrative procedure as an instrument for the protection of parties' rights and implementation of public interest is typical of all systems regardless of their legal framework. However, in some circumstances, priority is given to the protection of the parties' rights while in other periods of time the APA is considered an instrument of implementation of administrative tasks or public policies, whereby the procedure must be regulated in-line with the substantive framework (cf. Statskontoret, 2005, p. 75; Pavčnik, 2009, p. 35). Considering the above, it is not surprising that the regulation of administrative procedure is one of the major instruments to assert

the goals of the current political option.<sup>14</sup> Consequently, the range of application of the APA is growing in functional terms, that is, for public task providers irrespective of whether they are state bodies or private entities (16 sections in US law, 103 in German, 82 in Austrian, and 325 articles in Slovene APA). This seems logical since development-oriented actions of the state are, based on the concept of good governance, gradually turning from authoritative and centralized to service-oriented and decentralized (Hopkins, 2007, p. 713; Schuppert, 2011, p. 289).<sup>15</sup> In such context, administrative procedure law should be developed through coregulation with the parties and allow the coordination of opposed interests and efficient adoption of decisions (Heckmann, 2007, p. 39). On the other hand, there is a need to distinguish between several groups of (individual) administrative procedures or matters and thus between various degrees of the necessary restrictiveness of administrative authority.<sup>16</sup>

### **Comparative analysis of participation pursuant to general APA in German-oriented states and in the USA**

Given the importance of basic procedural rights, a key phenomenon is the intertwining of substantive and procedural law whereby procedural institutions achieve the level of constitutional safeguards (Radbruch, 1914). Administrative procedure law thus exceeds the classic Germanic tradition where it has (merely) an instrumental role and is subordinated to the purpose of conducting the procedure or to the expected outcome (Hoffmann-Riem *et al.*, 2008, p. 499). The Anglo-Saxon (court) law, on the other hand, considers procedural (basic or even constitutional) principles and rules to be part of natural law. Hence, the procedural principles are attributed higher priority or a rank equal to the substantive law, since unfair procedure could already imply unlawfulness. This applies in particular in circumstances where it is not possible to determine substantive law, for example, due to the technical nature of the standards or practice changing faster than regulatory procedures; in such cases, basic procedural rules become even more important (cf. Hoffmann-Riem *et al.*, 2008).<sup>17</sup> Such a shift has been observed in particular in the Anglo-Saxon systems owing to the impact of case law, which is why certain rights deriving from the European Convention on Human Rights are considered procedural rights in the United Kingdom and substantive rights in Germany (cf. Künnecke, 2007, pp. 167–72; Galleta, 2010, pp. 2–32). The participation of the party – that is, the right of the party to be heard or the *audi alteram partem* principle – belongs to the group of

principles and rules that in administrative procedure, despite or because of the a priori subordination of the party to the administrative body, provide a minimum (less than in contentious procedures, but still) procedural protection of the party already before the administrative body, pending the issue of the first-instance administrative act (Nehl, 1999, pp. 70–100; Craig, 2005, p. 272; Androjna and Kerševan, 2006, p. 103). It guarantees ‘equality of arms’ and fair trial and is therefore a vital element of the rule of law (Pavčnik, 2009, p. 35). The right to be heard is also a constitutional right, deriving from the equal protection of rights in various administrative areas (cf. Heckmann, 2007, p. 44). The principle of participation implies the definition and implementation of the rights of defense that – particularly when the party’s request is denied or when their legal status is infringed on by withdrawal of a right or imposition of an obligation – apply if public interest cannot be protected otherwise (for details, see Statskontoret, 2005, pp. 35–47). Thus, the participation of the parties may be deemed part of the principle of proportionality and legality or the rule of law in the broadest sense (Craig, 2005, p. 272; Androjna and Kerševan, 2006, p. 103; Künnecke, 2007, p. 149). An overview of individual systems (Table 9.1) reveals that while all the countries have the right to be heard enshrined in their APAs, they are differently elaborated.

In the United States, the purpose of administrative procedure is above all to protect the legal interest of all interested individuals or parties who have been given the opportunity to consider and submit facts, evidence, arguments, settlements, and so on, in relation to public interest. The principle of participation is thus a principle that applies to different procedures and different authorities and is based on the right to public participation in rulemaking (553 of APA). The APA specifically defines a rather complex hearing procedure in which the parties and other participants bearing legal interest (Sections 554, 554b, and 556c of APA) can make statements.<sup>18</sup> The right to make a statement and submit evidence is similar as in German-oriented states, yet it explicitly applies to all stages and to various administrative procedures or acts. More broadly, in the United States, the public has the right to submit proposals, comments, and arguments concerning a draft act (that is, notice and comment) that the US government publishes in the Federal Register and is judicially protected. In Continental administrative law – be it in theory, practice, or case law – the principle of participation or the rights of defense are as explicit as in the United States, although they have a different basis, this being the inquisitive principle. The above comparison clearly shows that the a priori presumption of the necessity

*Table 9.1* The right to be heard or the principle of participation in the APAs of selected states

State	The right to be heard – basic content (section no.)/ exceptions and preclusions	Examples of additional provisions regarding the rights of defense
<b>United States</b>	Prior to the adoption of an administrative act or measure, all interested parties and individuals in a hearing must be given the opportunity to make a statement and to submit and consider all facts/evidence and arguments that the time of the procedure and the public interest permit, particularly in an oral hearing (554b, c, 556)/ Yes (554)	Inspection of and access to public information (552), representation of parties (552a/h, 701b), statements by parties and representatives (554c, d), participation in rulemaking (553), right of review (702), attending procedures (554d), right to make a statement on corrections (556e), reasoning (557), instruction on legal remedies as part of administrative act (557b), participation of the party (557c), and so on
<b>Germany</b>	Pending the issue of administrative act; yet before an administrative act may be executed (11–13), the party must be afforded to challenge the relevant facts (28, 66); the party may attend a hearing/Yes (28), exceptions extended by amendments	Hearing of participants (11–9), impartiality (20), inspection of files (26, 29), reasoning, information on available remedies, and serving (39, 41, 69)
<b>Austria</b>	It is the purpose of the investigation procedure to ascertain the state of facts and to enable the parties to claim their rights and legal interests (37)/Yes (44b)	Impartiality (7), representatives (10, 11), instruction on legal remedies (13a), inspection of files, also for the blind (17, 17a), serving (22), language use, interpreting (39a), reasoning, and instruction as parts of the administrative act (58, 60, 61, 61a), appeal (63, ...)
<b>Slovenia</b>	Before a decision is reached, the parties must be given the possibility to declare themselves on all facts and circumstances necessary for the decision that affects their rights, as well as the possibility to challenge the decision (7, 9); the parties may attend the hearing/inspection/Yes (105, 144, 235, and 263)	Language use (62), statements by parties, and representatives (188), inspection of files (82), reinstatement of previous state of affairs (103), participation in procedures (43), reasoning, and instruction on remedies as constituent parts of the decision (210, 214, 215), right to make a statement on corrections (219–21, 223), right of appeal in case of administrative silence (222), and so on

of the inquisitive procedure (the principle of material truth, free evaluation of evidence, and the obligation to tell the truth) has become obsolete. According to the Slovene APA, establishing and proving the relevant facts is mandatory since the purpose of the special declaratory procedure is, in addition to seek the truth, also to enforce the party's right to be heard.<sup>19</sup> Yet the two concepts need to be distinguished since the right to be heard can be exercised in a different way as well. More so, according to the German APA of 1976, the inquisitive maxim is rather restricted also, even in procedures conducted *ex officio*. On the other hand, the law enhances shortened administrative procedures while simultaneously expanding the courts' full jurisdiction to correct potential breaches of fundamental rights (Künnecke, 2007, pp. 149, 156). Only some states define the basic principles in the introductory provisions of their APAs (for example, together with rules in Sections 9–29 of the German APA, and nine in Articles 6–14 of the Slovene APA). However, even if the APA does not define a chapter or title as “principle/s,” a general definition may be found in any such act as a value-based orientation (for example, typical in the Austrian APA with the right to be heard in Section 37 under the investigation procedure and additional rights of defense in Sections 13a, 17, and connected). It may thus be concluded that the APA should provide an obligation for the administrative body to ensure that the party is given the opportunity to make a statement pending the issue of the administrative act unless it simply follows the party's declarations or the case concerns minor issues (that is, there is no collision between the interests of the party and public interest). In the opposite case, preclusions are inserted and hearing may be excluded only if it would seriously jeopardize public interest.<sup>20</sup> Any APA should thus comprise more governance and less government (that is, administration) and exercise of executive authority regardless of the needs of public interest. To sum up, a broader set of rights of defense ensures a higher degree of democracy that, in turn, needs to be balanced with the effectiveness of procedure. A major deviation could, in fact, be counterproductive and make the (main) parties enforce their rights at a later stage.

### **Main findings – on the overseas convergence and *de lege ferenda* development**

Over the past years, the regulation of administrative procedure in Europe has been striving to ensure an effective and good public administration whose task is to proactively contribute to a society of welfare.

Public administration should first optimize (reduce) the need for authoritative interventions at the level of rulemaking. At the level of implementation, on the other hand, the task of public administration is to provide, both in individual cases and in the entirety of its competences, balance between the rights of individual parties and effective protection of public interest (cf. Statskontoret, 2005, p. 77). Several court cases, mainly in the United States, confirmed the need for an act regulating administrative procedure. According to the nature of common law, case law confirms, corrects, designs, and modifies rules and regulations, even an APA.<sup>21</sup> This confirms the initial hypothesis: despite or actually because of a different basic regulation of administrative procedure in selected states (depending on the different social systems), a convergence of regulations is evident. Consequently, each authoritative body must engage in effective partner collaboration with other social players. Yet despite common bases, the development of administrative procedure law differs from country to country – in the EU and even among the states of the same group, for example, between Germany and Austria on one side and Slovenia on the other. The latter, in fact, does not build only on the German tradition but has some characteristics of its own, resulting from its socialist past and current postsocialist framework as well as its rather late EU accession and small size. For such reason, the most important case law for the protection of the rights of the parties and public interest alike is the case law of the Council of Europe and the EU, which contributes to convergence and continuous development of administrative law in national legislations.<sup>22</sup> In addition, national procedural law in EU countries, just as with substantive law, must be harmonized (if not unified) if Community law is to be applied effectively and in all Member States.

The principle that the legislature creates administrative bodies and defines the limits of their competences must be considered a basic rule also in the sense of the separation of powers. Therefore, legislatures often adopt (too) detailed laws concerning administrative bodies in order to prevent state bodies from having unlimited power, whereby finding balance is of utmost importance. As regards other aspects, administrative procedure needs to be simplified so that the prescribed category of public interest is indeed protected as in accordance with the applicable sector-specific act. Such approach is traditional in the United States where formal and informal administrative procedures are defined (more in Fox, 2000; Giangrande, 2004), whereby formal procedure is more definite and carried out in hearing proceedings (the same applies to formalized judicial review) while informal procedure underlines

above all the rights of the public in rulemaking. Further, administrative procedures resulting from the restriction of power are merely process-oriented; for the effectiveness of public policies and, ultimately, protection of the democratic rights of the parties, an outward orientation needs to be considered. Sector-specific regulation should define the public policy objectives in such area, and the procedural regulation should pursue these objectives in order to achieve the desired results. This does not mean that the aspects of procedural fairness, accuracy, and formal legality would be subordinated or eliminated. Quite the opposite; with fundamental safeguards, such as participation of the parties concerned, procedural rules rise to the level of output and the boundary between substantive law and procedural law blurs in the light of achieving the common goal. A more modern regulation should, also in German-oriented states that draw on traditional definiteness of law, introduce at least a less procedurally programmed (cf. Galligan *et al.*, 1998, p. 343; Schuppert, 2000, p. 775) adoption of individual authoritative decision, for example, with the possibility of resolving administrative matters by agreement. At the same time, procedural law should cover the today (almost) completely nonprogrammed decisions, for example, administrative planning and adoption of general acts for the exercise of public authority.

## Conclusions

The analysis of institutions enshrined in the regulation of the United States and selected German-oriented states (Germany, Austria, and Slovenia) reveals that in principle regulation is an important factor of efficiency of decision making and development of legal culture in administrative relations. Compared with regulations in the German-oriented states, the US APA focuses on the protection of the parties in procedure and on the restriction of potential abuse of executive authority (also in relations to the legislative branch), while the Continental systems are rather oriented toward an efficient implementation of public policies and protection of public interest. However, the past decades have seen a convergence and mutual influence between both systems. A comparison between the above systems thus reveals that the rights of defense are indeed a common value of the German/European and US administrative settings, which also share the wish for effective and democratic procedures. Nevertheless, it can be said that there are still differences among individual countries, resulting from different legal traditions and levels of democracy. In this respect, the US APA still

regulates participation or the rights of defense in the relations between administrative bodies and parties more consistently, although mainly at the level of principle. As for the future, a comprehensive relation between executive-administrative bodies and the parties calls for a procedural regulation that exceeds the classic division between concrete and abstract administrative acts. The same general principles, mainly participation (collaboration, publicity, and transparency), should, in fact, apply to the adoption of general and individual administrative acts alike. The classic administrative procedure intended as defense from abuse of power is only one aspect of the societal needs; from now on (as for decades in the USA), in adopting an optimal decision, account should be taken of the complex economic and social situation. In this respect, the best weapon against the abuse of discretion within this complexity is a culture of participation.

## Notes

1. In terms of good governance and good administration, the aim of administrative activities and their legal regulation is to resolve conflicts between public and one or more private interests, with emphasis on restricting absolute power and rather encouraging the efficiency of public policies. Only in such manner can state authority be interpreted as democratic, legal, and legitimate. Governance is therefore understood as governmental activity with its administration operations and other societal networks included, as opposed to monopolistic hierarchical authority held by core state administration (cf. Bevir, 2011). Therefore, good administration as a “well-functioning bureaucracy” is the one with the capacity to support government and its partners, to steer the society and economy toward collective goals, being democratic, pursuing the rule of law and accountability, and having no corruption.
2. On the German theory of the rule of law, see Künnecke (2007, p. 23), where the author underlines that *Rechtsstaat* is more than the principle of the *rule of law* prevailing in the Anglo-Saxon systems. *Rechtsstaat* implies the elimination of arbitrary authority and is the ideal of the democratic state. Such idea significantly contributed to the fact that administrative law developed independently from constitutional law, since the political and constitutional postrevolution system in Germany after 1850 failed to meet the needs of the then modern society. Yet in order to implement the concept of the rule of law, a legalistic approach (for example, the constitutional provision about the independence of judges) does not suffice and it is necessary to examine and act as appropriate in the implementation of legal norms in practice (in order to prevent, for example, the independence of judges leading to individual arbitrary interpretations). Nevertheless, the German understanding of the rule of law more closely relates to the separation of power and to the administration being bound by the law than the American one (Pavčnik, 2009, p. 33, comparing Herzog in Maunz and Dürig, 1994, pp. 257–69, 1994, and the US aspect in Raz, 1986).



3. Before joining Yugoslavia in 1945, Slovenia had been subordinated to and organized in smaller administrative units within large state formations of the Habsburg and the Austro-Hungarian monarchies since the 15th century. Following independence in 1991, the new regulators pursued above all the German model, as, for example, in the case of the Constitution and other public law acts and reforms, from public administration to misdemeanors. Despite the socialist system previously applied in Yugoslavia, the Slovene legal system shows a traditional prevalence of the 'Austro-German source influence', particularly if compared with the rest of central and eastern Europe (Wright, 1997, p. 11). The Austrian influence on the APA was obvious already in Yugoslavia (Heckmann, 2007, p. 289).
4. As regards the intertwining of authoritative and nonauthoritative actions, the classic German and Austrian theories distinguish between *Eingriffsverwaltung* (intervention administration) and *Leistungsverwaltung* (service administration). However, authoritative and nonauthoritative actions cannot be fully separated since the functions of state administration imply both the exercise of state authority and the performance of nonauthoritative professional activities (Adamovich and Funk, 1987, pp. 143–55). Numerous administrative activities are carried out at the boundary between authoritativeness and nonauthoritativeness: for example, laws are formally adopted and authority is exercised by the parliament, yet the actual bearer of authority appears to be the administration, which prepares the bases for laws and draft laws. Likewise, although the administration concludes agreements, its actions in relation toward the counterparty are rather authoritative, as it normally proposes a "take-it or leave-it" version of the agreement.
5. Cf. Künnecke (2007, p. 8), who describes administrative law as 'constitutional law in action' or 'concretized constitutional law'. Cf. Ziller (2005, p. 261) and Heckmann (2007, p. 39) who consider an APA to be an administrative constitution (*Grundgesetz für die Verwaltung*).
6. For the German and UK systems, see Künnecke (2007) on individual procedures and judicial review (cf. Schuppert, 2000; Hoffmann-Riem *et al.*, 2008). For other countries, see Ziller (2005) and Rusch (2009). For selected special administrative procedures (for example, issue of licenses to private providers, environmental and health inspection control) and the subordinate use of national APAs, for example, in Poland or Hungary, see Galligan *et al.* (1998). Recent German theory (for example, Hoffmann-Riem *et al.*, 2008) suggests a broader understanding of administrative procedure (*Verwaltungsverfahren*), including individualized administrative acts and the design of regulations (*Gestaltungsverfahren*) to be issued by the government. However, the classic understanding of administrative procedure is narrower and refers merely to acts in specific individualized administrative matters.
7. One of the rare Council of Europe resolutions to refer exclusively to individual administrative matters is *Resolution (77) 31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities* (Council of Europe, Committee of Ministers, 1977). More recent documents regulate the adoption of both general rules and individual acts, for example, the European Convention on Human Rights (Article 6 on fair hearing) (Council of Europe, 1950) as well as CM/Rec(2007)7 on good administration, Rec(2004)6 and Rec(2004)20 on the improvement of domestic remedies and

on judicial review of administrative acts, and Rec(2010)3 on effective remedies for excessive length of procedures (Council of Europe, Committee of Ministers, 2004a, 2004b, 2007, 2010). However, these acts, although defining the party, leave the assessment up to the true legal nature of the act, not necessarily to the classification within national legislation. In defining administrative matters at the level of the EU, key importance is attributed to the 1990 ruling of the European Court of Justice defining what public matter is (Cananea, 2003, p. 568; Schwarze, 2004, p. 86; Statskontoret, 2005, pp. 10, 72–6). These trends are present to an extent and in a manner such that a further convergence and development in the same direction can be expected, despite country-specific history, economic situation, and needs.

8. According to Künneke (2007, pp. 3, 22), in German-oriented states, law is considered a scientific discipline itself (*Rechtswissenschaften*); contrary to the Anglo-Saxon theory and case law, particular importance is attached to the separation between public and private law. Such separation contributes to a different system of judicial review of the legality of administrative acts: in some countries, judicial review is provided by general courts while in continental states (for instance, France and the *Conseil d'Etat*, Sweden, Italy, Germany), review is carried out by specialized administrative courts (Ziller, 2005, p. 265).
9. Article 41 of the Charter of Fundamental Rights of the European Union (European Union, 2000). Particularly important is the European Code of Good Administrative Behavior adopted by the European Ombudsman in 2001 and revised in 2005 (European Ombudsman, 2001).
10. In contrast to the European legal system, in the US administrative activities began to gain importance in the early 1933 when President Roosevelt and the Democratic Congress enacted several statutes under the New Deal legislative plan, establishing new federal agencies to act as regulatory administrative bodies designed to deliver the country from the social and economic hardship and the great postwar depression. However, the Congress became concerned about the expanding powers that federal agencies possessed, resulting in the enactment of the APA to regulate and standardize federal agency procedures. The contentious political environment from which the APA was born triggered numerous studies and debates. In 1939, Roosevelt requested that Attorney General Murphy form a committee to investigate practices and procedures in American administrative law, suggest improvements, and formulate administrative procedures. The investigation focused on the following three issues: (1) administrative power to adjudicate in individual cases, (2) the delegated power to legislate by rule and regulation, and (3) the scope of review of administrative action by the courts. The prescribed series of forms used in administrative procedures are considered as the beginning of the creation of the APA.
11. Although some commentators stressed specific APA shortcomings, such as the lack of guidelines for informal adjudication, numerous other observers praised above all its striving for openness and participation; for example, notice and comment is considered one of the best 'inventions' at the government level (according to Lubbers, 2004).
12. For example, gathering information or *Environmental Impact Assessment*, cf. for Germany and EU, Pitschas (2008b, p. 95).

13. In the theory of governance, the concept of legitimacy is highly important; a (modern) APA is, in fact, intended to provide a proof of legitimacy (Considine and Afzal, 2011, pp. 374, 380). In the context of good governance and good administration, the task of administrative bodies carrying out administrative procedures is to guarantee not only fairness (in particular, participation of the parties and impartiality; *audi alteram partem, nemo iudex in causa sua*) but also a fair distribution of public goods, transparency, accountability, rationalization, and the impact of networking (Craig, 2005, p. 271). Above all, administration must build on the principle of respecting human dignity (Harlow and Rawlings, 1997, p. 497; Nehl, 1999, p. 166). For example, the German *Grundgesetz* has such fundamental value (on which [Western] democracy is based) defined already in Article 1: human dignity shall be inviolable; to respect and protect it shall be the duty of all state authorities.
14. Cf. McCubbins *et al.* (2007, pp. 3–16) stressing the purpose of the APA in the United States as an act to (1) ensure ‘fairness in administrative operation’ (same in Craig, 2005, p. 270) and already from the beginning also (2) ‘the effectuation of the declared policies of the Congress’; see also Lubbers (2004) and Nylander (2006).
15. Cf. Künnecke (2007, p. 46); also Barnes (2011, p. 345) and Kovač (2011, p. 64). Despite the state being held responsible for the interests of the society, there is sufficient room for participative and mutual resolution of existing and potential collisions (Pitschas, 2008b, p. 96).
16. For example, Galligan *et al.* (1998, p. 44) suggests three basic groups of administrative procedures: (1) decisions about the relocation of resources (subsidies) and issue of permits and licenses, (2) imposing obligations in public interest, and (3) investigations by the administrations whose outcomes are used by other bodies, for example, criminal court. The first procedures focus on decisions and outcomes, while the latter are justified by an inquisitive maxim. Similarly see Galleta (2010, pp. 33–74), dealing with cases of procedural rules by individual administrative areas.
17. In areas where such is not possible due to the complexity of issues (for example, regulation and [spatial] planning). Schmidt-Assmann (in Hoffmann-Riem *et al.*, 2008, p. 500) believes that it is wiser to go back to the idea of ensuring the correctness of administrative acts through a procedure highlighting the independence of procedural law from substantive law. Cf. Barnes (2011, p. 342): the need for procedural rules is directly proportional to the lack of substantive rules or to the degree of vagueness and discretion. The procedural rules are in the past two decades being taken over as substantive rules, and the boundaries between the substantive and procedural nature of regulations are becoming ever more blurred (Galligan *et al.*, 1998, p. 29; Nehl, 1999, p. 107; Heckmann, 2007, p. 41).
18. In the US APA, the definition of participants to the procedure is very broad compared with that in the German-oriented APAs. ‘Party’ (Section 551/3 of the United States; Government of the United States, 1946) includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency procedure, and a person or agency admitted by an agency as a party for limited purposes. ‘Person’ (Section 551/2 of the United States; Government of the United States, 1946)

includes an individual, partnership, corporation, association, or public or private organization other than an agency. A party who has been declared to be incompetent due to physical or mental incapacity or age has the right to a legal guardian (or legal representative – cf. Slovenia) (Section 552a/h of the United States; Government of the United States, 1946). Representatives are crucial in judicial review procedures since the APA sets high criteria of legal knowledge. Therefore, in the United States, individuals often hire attorneys even to obtain, for example, a passport. But attorneys quite often err, as they think that judicial review by the court will remedy all the defects in the procedure (cf. Fox, 2000).

19. The foundations of the principle of examination of the parties (Articles 9 and 146 of Slovenia; Government of Slovenia, 1999) lie in Article 1 of the Slovene Constitution on the democratic state, and Article 21 on the protection of personal dignity (Government of Slovenia, 1991). An indicator of such constitutional principles is the possibility for the party to state all legally relevant facts before an administrative act is adopted and thus monitor the actions of administrative bodies. As regards individual criteria, Slovenia evidently ranks among German-oriented states, yet despite a rather new law and huge scope of regulation it does not follow the modernizations observed in other countries, as its provisions may sometimes be exaggerated and deriving from the supreme significance of material truth (Androjna and Kerševan, 2006, p. 99; Kovač, 2011, p. 63).
20. See the second and third paragraphs of Section 28 of the German APA (Government of Germany, 1976) or the third paragraph of Article 144 of the Slovene APA (Government of Slovenia, 1999); cf. also ECJ case law from joined cases 8–11/66 Noordwijks Cement Accoord Case (1967), more on pilot rulings in Nehl (1999, pp. 72–93).
21. For example, the case *Immigration & Naturalization Serv. v. Chadha* (1983), where the court decided on the competence to adopt acts concerning deportation of foreign nationals from the United States based on the doctrine of the separation of powers. Or the case *Federal Trade Commission v. Standard Oil Co. of California* (1980) concerning the nonfinality of administrative act in the area of free competition at the agency level – ensuring judicial review (National Conference of Commissioners on Uniform State Laws [NCCUSL], 2010).
22. According to Cananea (2003, p. 577); cf. Heckmann (2007, p. 234). According to Nehl (1999, p. 80), such convergence is deemed vertical convergence (when EU law affects national law); at the same time, a horizontal convergence arises in various administrative areas.

# **Part IV**

## **Transparent State**

# 10

## Erecting the Public Sector Information Exchange

*Alon Peled*

Efficient interagency information sharing is critical to the execution of functions in the transparent state, and yet agencies persistently fail to share information. In the United States, members of the Hurricane Katrina (29 August 2005) investigation committee wrote that the American government remains the largest purchaser of information technology (IT) in the world and yet is ‘woefully incapable of storing, moving and accessing information’ (US Congress, Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, 2006, p. 1). In Australia, a Board of Inquiry determined that government agencies’ refusal to share data contributed to the death of Northern Territory infants through starvation (Bamblett *et al.*, 2010). In Britain, several agencies’ failure to share information contributed to the death of several children at the hands of their guardians (The Richard Inquiry, 2004). Why do government agencies fail to share information with each other and how can we incentivize public sector institutions to share information more effectively?

In response to this question, this chapter proposes a novel public sector information sharing framework that will increase state transparency. By facilitating effective information exchange among public sector agencies, this framework will support the transparent state to fulfill its functions within government and to satisfy citizen demands for government transparency. The chapter defines the public sector as a collection of institutions whose administrative staff maintains a monopoly over the legitimate process of producing, updating, and disseminating primordial data. Primordial data are primary data elements (such as a social security identifier) held on the entire population that link all datasets. The chapter proposes promoting public sector information sharing via three key ideas: (1) bureaucratic politics must be addressed;

(2) a Public Sector Information Exchange (PSIE) can be established to facilitate interagency data trade; and (3) bureaucratic language can be automated to facilitate information sharing transactions in a PSIE.

The chapter presents the theoretical foundations to build a PSIE prototype. A PSIE program can prompt the public sector to become an efficient broker of citizens' data, save billions of taxpayer dollars wasted on ineffective computer integration projects, ensure agencies maintain information autonomy, incentivize all agencies to exchange data effectively, and computerize the bureaucratic language to facilitate data exchange. In short, a PSIE program will enable the transparent state to more efficiently fulfill its core functions.

### **Case selection: HSIN, RINIS, and deNovis**

This chapter focuses on three public information sharing computer projects. The US Department of Homeland Security (DHS)'s unsuccessful Homeland Security Information System (HSIN) demonstrates the importance of addressing political dynamics: multiple agencies failed to share unclassified data about potential terrorists despite political pressure to do so. The successful Dutch Institute for the Routing of (Inter) National Information Streams (RINIS) project illustrates the potential of incentivized data exchange in the public sector, and the importance of clarifying data ownership. Using RINIS, agencies successfully exchanged data while preserving legal ownership of shared data elements. The partially successful deNovis system, designed to facilitate sharing of personal health billing and financial adjudication information, validates the possibility of computerizing a bureaucratic language. HSIN, RINIS, and deNovis vary in terms of domain (defense, social welfare, and health), geography (the United States and the Netherlands), and project ownership (public ownership, joint public-private ownership, and private ownership). Therefore, the HSIN, RINIS, and deNovis examples are intended to illustrate the chapter's ideas, rather than to present comprehensive empirical case studies.

### **Defining data, information, transparency, and the transparent state**

Data is a set of discrete objective facts that form a record (Newcomer and Sharon, 1991; Davenport and Prusak, 1998, pp. 2–3). Its properties of being lightweight, replicable, and easily transferable (Carr, 2003) have led to rapidly increasing digitization. All organizations depend on

digital data and manage and track it as records inside information systems (Solove, 2004; Shulman *et al.*, 2005). Information is 'data endowed with relevance and purpose' (Drucker, 2006, p. 129). People and organizations contextualize and categorize data in order to convert it into information (Davenport and Prusak, 1998, pp. 3–4). Organizational information is more than the sum total of the individual data elements used to create it. Transparency is openness to public scrutiny as defined by the rights and abilities of organizations and individuals to access government information and information about government (Bannister and Connolly, 2011, p. 5). In the transparent state, governments pursue increased transparency and citizen participation embedded in state structures, procedures, and institutions to (1) answer a citizen demand for transparency; (2) find innovative solutions to collective problems outside government; and (3) regain trust and thus legitimacy and authority (as explained in the introductory chapter).

### **Digital Babel: explaining information sharing failures**

Public sector organizations can be considered complex digital Towers of Babel due to their towering, multilayered structure (Peled, 2007). Two scholarly approaches have traditionally been used to explain the evolution of these electronic Towers of Babel: political and managerial. The political approach views government officials as agency-centric actors who use data as tools in interagency political struggles to advance their agencies' reputation and autonomy (Kraemer and King, 1986). The managerial approach argues that senior-level government officials should have developed a preemptive enterprise architecture program to ensure communication between complex and unique layers of computer programs (OMB, 2005). Both of these approaches reinforce the politics versus administration dichotomy. They focus on the public administration domain and do not consider the role of the state in agency information sharing practices, and also do not suggest concrete ways to improve information sharing.

Two alternative approaches seek to enhance the transparent state and do suggest means for increasing information sharing: utopian and incentivized. The utopian approach emphasizes that the state must be transparent and government officials have a moral obligation to serve the public. Agencies can use this obligation to promote a culture of serving the greater common good and motivate information sharing (McLure Wasko and Faraj, 2000). The incentivized approach proposes to account for the state and for bureaucratic politics in designing



public administration practices by creating state legislative and exchange mechanisms that will reward government officials for sharing information (Willem and Buelens, 2007). Olson argues that large groups must provide selective incentives to their members in order to motivate them to contribute to the common good (Olson, 1971, 1982).

For all its advantages, the utopian approach does not explain why agencies would agree to “free” precious information. The shortfalls of this approach are demonstrated by the minimal success of the Obama government’s Open Data program in compelling agencies to release data for free. Most agencies appeared to comply with the program while, in fact, not releasing valuable datasets (Peled, 2011). This highlights the necessity of finding a different path to improve information sharing. This chapter advances the incentivized approach by proposing a novel rewards-based framework to encourage public sector information sharing. This approach is proposed as the best way to enable the transparent state to develop practices and mechanisms that allow it to fulfill its goals of increased citizen participation and transparency.

### **The public sector’s information-centric mission**

To improve information sharing, we must first redefine the public sector. Every generation defines the public sector in its image. Woodrow Wilson, in 1887 in seeking to protect the public sector from corrupt politicians, defined public administration as lying outside the proper sphere of politics. The post-World War I, Great Depression generation defined public administration as the sector in charge of eliminating waste and conserving material (White, 1926). Herbert Simon, under the spell of World War II, defined the public sector as the realm of decision making (Simon, 1997). After the tumultuous 1960s, scholars regarded social equity as an important mission for government (Frederickson, 1971). More recent definitions of the public sector have been influenced by globalization and theories of social capital (Pierre, 1995).

This chapter highlights data ownership as the public sector’s defining feature. The public sector’s data elements are ubiquitous, ranging from the everyday (such as a driver’s license ID) to the obscure (such as Kentucky’s Bonus Wildlife Management Area Quota Hunt Deer Permit ID). Agencies gain resources when they become the owners of a new data element (for example, recently the US Department of Agriculture [USDA] won new resources to develop standards for organically produced food products). Ownership of a data element is assigned or revoked by law (for example, a US congressional act assigned ownership of Energy

Guide labels to the US Department of Energy [DOE] and removed this responsibility from state-level bureaucracies). The growing political and technical influence of external IT contractors and data consultants also contributes to the increasingly important information-centric role of the public sector (Peled, 2000). Finally, an information food chain, founded on the public sector's primordial data elements, governs our modern economy. The public sector owns data elements about every life event: it owns the most valuable information assets.

## **Placing bureaucratic politics first**

Today, international players, nonprofit organizations, subfederal agencies, and contractors all shape public policy to a similar or equal extent as full-time public sector employees (Cooper, 2005). Agencies also possess ever-more-sophisticated tools to compete over power and budgets. Thus, the public sector has shifted from a top-down service delivery model to a network-oriented model with numerous state and societal participants (Kettl, 2002). Within such an environment, what happens when a department attempts to command information sharing from above?

HSIN's history illustrates why information sharing cannot be commandeered by a single agency even in the most critical domain – combating terrorism. Prior to the creation of HSIN, local security officials complained that counterterrorism information received from federal agencies was not timely, accurate, or relevant (GAO, 2003). In 2003, DHS began designing HSIN as its nationwide collaboration system to share Sensitive But Unclassified (SBU) data with partners who were engaged in preventing security threats. The system was designed to address the needs of 35 communities of interest (such as emergency management) operating within 18 critical infrastructure sectors (such as commercial nuclear reactors). In 2007, DHS spent \$70 million to build HSIN (GAO, 2008b).

However, state and local agencies did not cooperate with HSIN. Local security officials resented the fact that DHS perceived the fight against terrorism as an exclusive federal responsibility. They wanted concrete benefits in exchange for providing data to DHS (GAO, 2007a). Agencies chose to upgrade their own information sharing networks rather than join HSIN (GAO, 2006). Security managers questioned why DHS built HSIN from scratch instead of adopting an existing network such as one operated by the US Department of Justice (DOJ), or the successful US nationwide Regional Information Sharing System (RISS), operational since 1974 (GAO, 2007b). In September 2007, DHS decided to terminate HSIN.

Immediately thereafter, DHS decided to launch a follow-up project called “HSIN Next Gen.” DHS continued to employ a command approach while designing and building HSIN Next Gen. In October 2010, DHS again terminated the HSIN Next Gen project. This termination reduced DHS IT costs by \$128,969,000. DHS cited, among other things, continuing cost, schedule, and performance shortfalls and the lack of key IT management controls and capabilities that are essential to mitigating such shortfalls and ensuring successful system delivery (GAO, 2013). But, in fact, the HSIN project failed twice because DHS did not treat other agencies as information sharing peers. DHS wanted other agencies to provide data and to let DHS ‘connect the dots’ to prevent terrorist attacks (GAO, 2003, p. 13). Given this approach, DHS did not create new information sharing partnerships and did nothing to leverage information sharing mechanisms in the private sector. Interesting to note is that the HSIN history corroborates Lehrke and Schomaker’s finding that a similar centralized, directive approach in the international counterterrorism arena was ineffective to prompt US allies to adopt US-promoted policies (see Chapter 6).

HSIN’s sad history is not an outlier; selfish bureaucratic interests often confound information sharing. Thus, bureaucratic politics must be addressed before efficient information sharing can take place. A PSIE would utilize bureaucratic self-interest by ensuring concrete incentives for data exchange among public sector agencies. The Dutch RINIS project illustrates how such an information sharing marketplace can be successfully established, with agencies retaining legal ownership over information assets.

## **Creating the Public Sector Information Exchange**

The public sector is an ocean of isolated databases. Agencies invest billions to build and maintain a system of systems to connect these databases. Since most databases are “closed gardens,” the value of their information assets cannot be independently assessed. With a PSIE program, government entities will transact time-sensitive information assets. Each agency will develop computer algorithms to determine which information assets it is willing to sell (for how much credit) and which ones it wants to buy (for what price). An agency will claim value for its information assets if it has external buyers for them. Taxpayers will invest money to expand applications and databases that prosper in this information marketplace. Agencies will then have compelling incentives to improve data quality and to facilitate access to their data.

Such a computerized network for data exchange between public agencies exists in the Netherlands. In the mid-1990s, the chief executive officers (CEOs) of three large welfare organizations realized that Dutch citizens could register in one public agency to receive unemployment benefits while being registered as employed in another agency. So, the CEOs created an interorganizational information exchange to eliminate fraud (Homburg, 1999). First, they determined agency ownership of data elements. A 1995 study revealed that most data elements were “claimed” by a single agency. RINIS allowed each organization to retain ownership over its own data elements. For example, the Citizens Registration Office was the authentic owner of residents’ dates of birth, while the Job Center was the owner of residents’ job-seeking histories. Organizations signed agreements specifying the terms for accessing other organizations’ data elements (Bekkers, 2000). The RINIS institute, established in 2003, facilitated such data exchanges; it did not integrate or store the data, thus ensuring that agencies retained autonomy over their data elements.

RINIS’ politics-first strategy was successful. It became impossible to obtain a welfare benefit on false grounds. The program enabled organizations to handle more cases more quickly. More organizations signed on. In 2004, participant organizations had already exchanged 56.5 million messages as compared with 200,000 such messages that were exchanged during RINIS’ first year. The Organization for Economic Cooperation and Development (OECD) recognized RINIS as a “best-practice system” for electronic information exchanges. RINIS’ fraud detection mission was expanded to support additional tasks. In 2005, the Dutch government announced plans to standardize the program to handle all electronic data exchanges (OECD, 2007). RINIS demonstrates that it is possible to build an effective information sharing system without forcing agencies to surrender information assets.

### **Automating bureaucratic language**

In the context of a large bureaucracy, how can incompatible computer systems converse, to ensure effective information sharing in the proposed PSIE? Public sector agencies frequently fail to standardize computer systems’ concepts and definitions. For example, US federal agencies utilize 56 different labels to designate data as SBU. Different agencies utilize the same label to express different meanings, and sometimes different labels express the same meaning (GAO, 2006). If such confusion surrounds the use of a single concept, how can we hope that one computer system will understand the language of another?

Scholars have noted the similarity between bureaucratic and computer languages: both are complete, rational, functional, authoritative, technical, standardized, template-driven, and unidirectional (Hummel, 1977; Shuy, 1998). The history of deNovis (originally eHealthDirect) demonstrates that a bureaucratic language can be programmed. US federal health care programs (including Medicare and Medicaid) cover 115 million US citizens. An IT problem specific to health care is the adjudication of insurance claims. In 2003 alone, the American federal government spent an estimated \$250 billion on adjudication (60 per cent of claims were manually adjudicated).

In December 2000, deNovis was established to automate insurance claim adjudication. deNovis' engineers created a new English-like language: Health Insurance Contract Language (HICL). Health insurance claims were matched to the HICL versions of complex payer and provider contracts. The system then made payment decisions. The system proved capable of handling complex health care situations, ranging from a simple physician office visit to multihospitalization liver transplant cases.

deNovis' technology was revolutionary: the company's engineers developed a singular vocabulary and set of grammatical rules drawn from the medical jargon of around 200 separate health insurance companies. It succeeded in rendering incomprehensible medical bureaucratic language into simple English documents, informing medical providers and patients how much a specific medical treatment would cost, and explaining to both patients and providers how the provider's fees and patient's benefits were calculated. This technology also empowered health insurers to combat fraudulent claims and to more quickly customize medical plans.

The value of deNovis' technology was quickly recognized: leading venture capital companies invested \$125 million between 2001 and 2004; deNovis technology won awards; in 2002, Empire Blue Cross and Blue Shield of New York signed a ten-year agreement with deNovis valued at \$1.3 billion; Tufts Health Plan (THP) also invested heavily in deNovis' technology. Most impressive, in 2003 deNovis signed a \$100 million contract with the US Centers for Medicare and Medicaid Services (CMS) to replace the CMS' core claims adjudication system, responsible for adjudicating claims valued at \$1 billion a day for 80 million Medicare patients (Healy, 2004).

Then, on 22 October 2004, deNovis collapsed. However, the unexpected failure resulted not from technical problems, but from wasteful financial practices. deNovis' technology did succeed in automating significant portions of the complex US bureaucratic medical language,

and deNovis' innovative solution lives on. Another company purchased deNovis' abandoned patent applications. Organizations including the US Health and Human Services (HHS) are developing deNovis-like languages to resolve problems (HCLS, 2009). deNovis' groundbreaking technology provides a prototype for information sharing among public sector agencies that employ separate, noncommunicative computer systems. An automated bureaucratic language can be employed in a PSIE to facilitate interagency exchange.

### **A “public goods first” political strategy to nurture information exchange**

I propose a three-phased political strategy to nurture a PSIE. First, launch a PSIE to address a public goods problem – such as clean air, soil, or water – that requires numerous agencies exchange information. Public goods domains discourage secrecy and can benefit from public and media interest in the domain. Homeland security is not an optimal domain to pilot such an information sharing project, as agencies can refuse to share data citing security concerns. Second, empower agencies to develop starter datasets that hold valuable information for other organizations. Exchange will then quickly evolve from horizontal trading (that is, among public sector agencies) to vertical trading (incorporating state, local, and other organizations). Third, expand the information marketplace to address a closely related arena within the public goods domain that faces information sharing challenges that could be resolved through an information exchange.

Biomonitoring is an ideal incipient domain. It measures chemicals in individuals' tissues or bodily fluids to provide insight into the general population's exposure to chemicals. First, this domain is too complex for a single agency to tackle. Currently, the US Environmental Protection Agency (EPA) develops chemical toxin risk assessments and the US Centers for Disease Control and Prevention (CDC) collects data on all known chemicals. However, the EPA struggles to complete risk assessments because biomonitoring data alone does not indicate the source, route, or timing of a person's exposure to a given chemical, and the CDC only succeeds in collecting data on a fraction of known chemicals. Second, the law (sections 5a, 8a, and 8d–e of United States. TSCA, 1976) strongly discourages secrecy in this domain. The public cares deeply about exposure to chemicals, and the media has published chilling reports detailing how biomonitoring data collection efforts neglect young children. Finally, there are numerous organizations already active in this domain: EPA departments, federal departments,

federal agencies, states, nonprofit organizations, and chemical corporations (GAO, 2009).

The EPA's Integrated Risk Information System (IRIS), with data on over 540 chemicals, is a good starter dataset to cultivate biomonitoring data exchange. Once exchange in biomonitoring data is successfully established, the exchange can be expanded to address a neighboring problem, such as the US Formerly Used Defense Sites (FUDS) cleanup job or biosurveillance data (the National Bio-surveillance Integration Center [NBIC] examines biological and chemical threats). Both the FUDS cleanup challenge and the collection of biosurveillance data are too complex for a single organization to address alone; the law (United States. CERCLA, 1980) deters secrecy, and there are numerous organizations involved in these projects.

### **Ethical, political, economic, legal, and technical challenges to a PSIE**

The primary ethical challenges to a PSIE concern privacy and data security: a PSIE may allow agencies to link disparate data together, creating a "Big Brother" government that violates citizen privacy; it may also leave sensitive data vulnerable to hackers. However, in a PSIE, data will be scattered across decentralized databases rather than stored in a central location, preventing the creation of a centralized "Big Brother" database. A cheaper price will be set for browsing data rather than downloading it. This will discourage agencies from duplicating datasets. This will mean fewer ill-secured databases for hackers to invade. In a PSIE, each agency will be incentivized to guard its own information assets and watch how these data elements travel across government. This will mean more proactive privacy guardians and fewer opportunities for the guardians themselves to invade citizens' privacy.

Another ethical challenge to a PSIE is that it will contradict the US Freedom of Information Act (FOIA): in a PSIE data is for sale, whereas the FOIA dictates that agencies' data is a public good. However, a PSIE congressional act could stipulate that certain data is tradable while other information must be made freely accessible to citizens. The FOIA provides transparency via a reactive, delayed, emergency-oriented, history-driven, confrontational, judicial, do-it-yourself, cost-driven mechanism (Kreimer, 2008). PSIE will complement the FOIA by providing an aggregated, proactive, immediate, business-like, agency-driven, cost-effective mechanism to increase interagency sharing of the vast data that the FOIA never touches. The FOIA works because there is a

scarcity of information outside government. The PSIE will work because there is a scarcity of shared information inside government.

Politically, critics could argue that the PSIE will give an unfair advantage to data-rich agencies. A fair exchange game must be created and nurtured. A neutral broker organization could help weaker agencies to deploy exchange interfaces, develop effective data pricing algorithms, and discover hidden information gems and polish them for exchange. Weaker agencies could partner with each other to develop new information products. The broker organization would be empowered to impose the ultimate penalty on cheaters – disallowing future exchange.

An economic challenge to a PSIE is that there is no need to invest in a data exchange marketplace because public sector data exchange already exists. Currently, agencies are compensated for data given to other agencies with dollars (in 2007, DHS paid the US Social Security Administration [SSA] \$3.5 million for data to support its E-Verify program), with data, or with congressional funding (GAO, 2008a). However, current bilateral public sector exchange is inefficient and benefits only a handful of data-monopolizing agencies such as the SSA. The commoditization of contested commodities (public sector data is a contested commodity because its exchange evokes an ethical debate) reveals that the only effective marketplace-based solution to their exchange is to foster real competition in real currency within an open exchange.

Similarly, economists could argue that RINIS demonstrates the effectiveness of an interorganizational data standardization agreement; hence, a marketplace solution is not needed. Regrettably, such an amicable agreement between agency chiefs is unlikely to emerge in a complex and decentralized ‘government of strangers’ (Heclo, 1977), such as the US government. Rather than fight a hopeless rearguard battle to impose a technical standard on reluctant agencies, the proposed marketplace solution will build an intermediary marketplace service that translates requests from buyers and submits them to each agency in its native language (Bonometti *et al.*, 1998).

A further economic challenge to a PSIE is the possible emergence of an information sharing oligopoly regime of information exchanging blocs. However, currently only a handful of database-producing agencies (such as SSA) benefit from data exchange, at the expense of most other agencies (Prins, 2004). A congressional PSIE Act will ensure that permanent information exchange blocs do not emerge in a PSIE. Key data elements (such as Social Security Numbers) can become nonexchangeable infrastructure components to support exchange. Scholars and government officials can run simulations based on a PSIE prototype using real public



sector datasets to examine if exchange blocs would emerge and, if so, change the PSIE's exchange rules to alleviate this danger.

The chief legal challenge to PSIE is that powerful agencies might pressure their congressional subcommittees to rig the rules of the exchange game to their advantage. Congress might then enact laws that create barriers for obstructing cross-boundary information sharing among government agencies. Congressional subcommittees have penalized agencies in the past for developing creative sharing arrangements. In 2002, 25 agencies created grants.gov, a web-based interface to all federal grants. They invented a creative budget-sharing mechanism to pay for this initiative. However, in 2006 Congress prohibited the use of this mechanism (Fountain, 2007). Indeed, constituency objections to a PSIE are likely to be strong. For example, the chemical industry is unlikely to favor the type of biomonitoring regime that will emerge with the PSIE's success.

Only a PSIE Act can address such constituency concerns. Such an Act would raise the priority and importance of the information sharing topic, provide political support and funding to the PSIE, secure the privacy and confidentiality of shared data, help agencies develop thicker trust toward each other, provide a mechanism for citizens to opt out of certain data exchanges, prohibit unjustifiable uses of purchased information goods, and vest public sector agencies with legal ownership of the information products they labor so hard to create. RINIS demonstrates the importance of data ownership, as does Coase's theorem: property rights must first be clearly defined in order to allow market transactions to take place and market efficiency to be attained (Coase, 1960). Congress can find support for such legislation in the numerous major congressional acts, presidential directives, and US Office of Management and Budget (OMB) memorandums that already encourage agencies to adopt a marketplace approach to increase electronic data sharing (Vann, 2005).

A technical challenge to a PSIE is that human language is too arbitrary, and bureaucratic language too metaphoric, to be programmed. Yet, computational linguistics teams have made great strides in dividing and conquering the human language into various domains. European citizens execute library searches in their native language but retrieve data in any available language. People everywhere communicate meaningfully with computers to set up travel plans or study for a test.

This chapter proposes a new public sector information sharing framework based on three key ideas: bureaucratic politics first, the PSIE, and the programmable bureaucratic language. The proposed information

sharing framework situates the domain of public administration in the framework of state structures and bureaucratic politics. It addresses challenges to the state arising from contemporary trends in the collection and aggregation of information by proposing a novel framework that will enable the transparent state to effectively fulfill its functions and goals. However, only the study of data generated via a pilot program in which government officials exchange real information assets will provide the evidence to support this chapter's theoretical arguments.

# 11

## Open Government, Behavior Control, and the Privacy Risk of Digital Government

*Alessandro Spina*

### Introduction

It is hard not to notice the active presence of governmental bodies on social networks. Public administrations are recruiting “social media” officers and adopting policies for the use of social media in order to provide more content online and engage in direct interaction with citizens. Everyone can become a “friend” on Facebook or “follow” on Twitter public institutions, start conversations, and have communications mashed up in the daily journal of the social networks. The engagement of public administrations with various social networks is often portrayed as a modernization trend toward more transparent government or Open Government. The growing online presence of these institutions is a signal that Open Government not only is about communication but is also becoming a new interactive and collaborative form of governance. In parallel and somehow less visible than this trend, public bodies are also turning to alternatives to the law for influencing behavior. This includes new techniques of government that incorporate behavior-based instruments such as technical constraints or choice architecture, social norms, and information strategies (Calo, 2014). These new regulatory tools are referred to as “nudges,” as they indicate a less coercive or direct intervention by the public institutions in the private sphere of individuals.

This chapter looks at these two trends in the modern state as represented by Open Government, as a digital model of transparency of public bodies, and Nudge, as a paradigm of all behavior-based regulatory techniques. Both were conceived of as responses to deficiencies public bodies face when trying to address current challenges and subsequently evolved as separate approaches for the modernization of governments. However, it is argued here that their synergistic and converging pattern

within increasingly digital forms of government presents an important challenge. The relationship between government and citizens is set to be fundamentally modified in a way not seen since the state's early development, with resulting implications also for the balance between public power and citizens' freedoms.

This chapter is composed of three sections. In the first section, it seeks to identify Open Government, distinguishing it theoretically from the traditional idea of transparency of public administrations and rooting it in the practices and organizational models of the digital economy. The release of a huge amount of data held by public institutions that is associated with Open Government creates the possibility to integrate platforms of collaboration in regulatory regimes (O'Reilly, 2010) and *wiki* government (Noveck, 2009), both of which might address a series of information inadequacies often recognized in the literature on governance. In the second section, the chapter discusses the impact that Nudge and the vast array of nonlegal tools of government that are based on behavioral insights may have in the area of regulation. In particular, this section describes the constraints that framing, visualization, and choice architecture place on citizens' behavior.

In the third and final section, the privacy risks of digital administrations are discussed. It is argued that these two trends of modernization of public administrations, Open Government and Nudge, must necessarily be analyzed together, as they are two different aspects of the same growing informational power of using large datasets or "Big Data" (Mayer-Schönberger and Cukier, 2013). In this light and almost paradoxically, without robust safeguards in place for the protection of the right to privacy and self-determination of citizens, initiatives to reform public administrations in light of Open Government paradigms could be detrimental to the democratic values underpinning the principle of openness and transparency.

With the Internet, the cost of collecting, storing, and distributing data has radically decreased. Devices such as smartphones and tablets make it possible (and cheap) to transform most of our life, including actions and expressions, into digital data. Personal or aggregated information is processed online and stored in the dematerialized "cloud" forever (Mayer-Schönberger, 2009). In the near future, "things" will be able to send messages and we will be able to be connected with them. At the level of individuals, we are increasingly confronted with the social by-products of Information and Communication Technologies (ICTs). Interactions with friends and acquaintances, professional contacts, and public debates are "channeled" through social networks, blogs, and Apps.

In public policy, ICTs are perceived as being key drivers of social and economic development, providing ‘the underlying connectivity for a range of innovative applications, like “smart grids,” electronic health-care, e-government and so forth’ (OECD, 2011a). The digital transformation of society involves a change in the traditional way we are able to control our environment, but more importantly, in the way we are also controlled by those who decide the environment in which we operate.

As a result of increased technological capacities, large datasets of information whose size and complexity exceeds traditional management capacities, or Big Data, are being created. The control of Big Data, in other words, making applications that make these datasets meaningful, is power. Information gathering has traditionally been considered essential in every regulatory regime.<sup>1</sup> Actors that control information are able to understand statistical correlations and make inferences and thereby to use information “strategically” in order to influence the decision making. The added value of behavioral advertising, made on the basis of data collected about consumers’ online behavior, is in the increased effectiveness of the targeted message. A grid is deemed “smart” in so far as it is more effective in integrating data about optimal use within the underlying processes of delivery of services.

## **Open Government as a digital platform**

The salience of access to the information held by public institutions can be fully appreciated only in so far as its relative usefulness becomes evident. It would be inaccurate and misleading to understand Open Government as a digital application of the traditional “transparency” principles of public administrations. Open Government implies a quantitative rather than qualitative increase in the degree of administrative transparency, in so far as it aims to make large quantities of data held by governments publicly accessible. Thus, while transparency has been associated historically with public accountability or trust in government or to unveil the *arcana imperii* to citizens, the main purpose of Open Government is to unleash data held by governments as a public resource and to engage citizens in governmental activities (Fenster, 2012).

## **Transparency as an accountability mechanism**

Transparency enables the exercise of collective control on the activities of institutions, and in particular on the institutions’ decision-making process. It is believed to deter corruption and questionable administrative practices. In this light, transparency is seen as a way to limit and

call to account administrative power. It is also linked with the loss of effective control over public administrations through more traditional mechanisms, such as judicial review or parliamentary oversight, due to the emergence of transnational regulatory networks (Slaughter, 2004). In this sense, the appeal to the virtuous effect of transparency has become almost a cliché, although its complexity is not fully understood in administrative law (Fisher, 2010).

Transparency has an important function in the area of regulation. The drive for transparency in this context is probably attributable to the fact that informational inadequacies (filtering of relevant information, neglect of early warnings, and so on) have been identified in many of the regulatory failures of the past two decades, such as the Enron Scandal, the BSE saga, or the 9/11 terrorist attacks (Power, 2007). The relevance of transparency is associated in public discourse with the degree of public trust of organizations or processes, recalling the preventive function that Justice Louis Brandeis originally conferred to the concept of publicity when speaking of sunlight as being ‘the best of disinfectants’ (Brandeis, 1913). Transparency aims at fostering the accountability of the decision-making processes of public institutions (Meijer and Curtin, 2006). As an example, one could look at the many mandatory disclosure rules adopted in different sectors of the economy in order to ensure that public bodies and experts take decisions publically. Similarly, accountability of public institutions is also the fundamental theoretical underpinning of the recognition of an enforceable right to have access to documents held by public institutions. The worldwide diffusion of this right, which originated in its modern form with the adoption of the US Freedom of Information Act (FOIA) in the 1970s, demonstrates the relevance of the fundamental principle of openness and transparency of public institutions<sup>2</sup> in modern democracies.

### **Openness as an economic characteristic: the government as a “software”**

The characteristic of openness in the idea of Open Government is not directly undergirded by the idea of ensuring public scrutiny. Openness, in this context, is not a mechanism to ensure accountability and trust in the decision making of public institutions. Though stemming from a conceptual proximate idea, its impact in the regulatory system is different and it must be specifically analyzed. With Open Government, transparency is not an end but a means by which it is possible to create collaboration and active involvement of the public in government activities.<sup>3</sup> To better understand this concept, openness here invites the

active rather than passive engagement of citizens. Openness is not an instrument for ensuring access to a tightly controlled environment, but it is instrumental to the possibility of using and manipulating a valuable informational asset – public data – such as the software code in “open source.” In this light, “open government” represents a radical rethinking of the functions and role not only of public administrations but also of how citizens interact with public administrations; thus, it represents a radical reordering of the state. Openness means more shared availability of resources rather than more transparency.

In order to better understand Open Government, it might be helpful to introduce the concept of openness as an economic characteristic informing the model of industrial production in the digital economy (Benkler, 2006). Openness, in this context, includes the sharing of information and resources under a nonrestrictive legal regime – an “open” regime contrasted with proprietary or closed systems. The conceptual values and mechanisms of the digital economy represent a revolutionary governance change when transposed in the context of government. First, there is a consistent tendency to the aggregation of data or dispersed knowledge. This can be either an intentional process built-in to the technical platform (for example, *Wikipedia* or *open source software*), wherein users voluntarily contribute, or a hidden functionality of a platform that exploits the data (for example, the mechanism by which *Google* understands user data and is thereby able to refine the relevance of the indexed web pages for future search queries). With data aggregation, there comes also a tendency for enabling the incorporation of feedback from users for the purpose of quality improvement. This is what is referred to by technology scholars as the “perpetual beta,” the built-in functionality that enables the continuous upgrading of the system. It is interesting to note that one of the justifications for keeping “open” systems is that it is often not those who build it who have the best ideas on how to use it; for example, with a database it is often a party unrelated to the controller of the database who finds an unforeseen use for it. This is also what is graphically represented by the proliferation of suffixes representing different versions of the same application (for example, Web 2.0 is the sophisticated evolution of the first-generation Internet applications). Finally, as the platform becomes a “collective” good, the distinction between users and producers of information is fundamentally altered. The network externalities generated by the interaction of all users and producers in the project are deemed to make outcomes yielded qualitatively commensurable or superior to hierarchically governed projects.<sup>4</sup>

## The application of Open Government to public governance

What Open Government would like to achieve is a transformation of governments by incorporating the conceptual value and other quality control mechanisms of the most successful products of the digital economy. This implies a paradigm shift to a post-Weberian administration (Noveck, 2009), where civil servants are not entrusted with the monopoly of expertise but are encouraged to create collaborative relationships with digitally connected citizens (*netizens*). Government is hence considered as a platform (O'Reilly, 2010) for harnessing the dispersed knowledge (in other words, crowdsourcing) of digital contributions in order to improve the quality and responsiveness of policymaking and service delivery (Report of the Australian Government 2.0 Taskforce, 2011). A celebrated example of an open government initiative is peer-to-patent,<sup>5</sup> a website section of the US Patent and Trademark Office (USPTO) whose purpose is to improve the quality of granted patents by building a community of contributors and enabling the public to provide information relevant to assessing the prior art of pending applications.

Open Government relies on rules and mechanisms that aim to make data held by governments, heralded as the new "gold,"<sup>6</sup> freely available for reuse and, furthermore, to encourage participation in governmental activities through nonrestrictive regimes. The key aspect in this openness is the mobilization of ideas and serendipitous regulatory innovations around the released dataset.<sup>7</sup> This is why the development of applications on the basis of "open" data is publicly promoted on the agencies' websites. Feedback from the users of the data and creative solutions to problems are sought after, as they are seen as an opportunity for public administration to improve their activities. In this light, social networks become extremely useful, as they permit the mobilization of resources and present an easily accessible and potentially unlimited audience. They are also powerful tools to use in communication strategies in order to facilitate the information flow between interested parties, as seen during the recent volcanic ash episode (Burgess, 2011) or the H1N1 pandemic crisis. They also can support behavior-based strategies such as 'information cascades,' as has been studied with voluntary vaccination (Feng *et al.*, 2010). Moreover, public institutions can use social networks to collect granular and modular contributions that could inform their decision making.

One might, for example, think of a system for reporting, collecting, and processing "near miss" events in the field of safety surveillance. In a similar case, data mining using social networks has been proven to contribute to drug safety (White *et al.*, 2013). As regulatory frameworks



have created rigidly formalized reporting schemes that often filter out relevant information, platforms that let public institutions use social networks could integrate crowdsourcing into the regulatory process in order to carry out safety surveillance.

## **Regulatory Nudges**

The second popular trend in public administration is the idea that government can change behaviors of citizens by the use of nudges (Thaler and Sunstein, 2008). Findings in a number of scientific disciplines (neuroscience, psychology, sociology, and behavioral economics) have highlighted the irrational features of human decision making, such as inertia and procrastination, as well as in the processing of statistical and abstract information. The insights of behavioral sciences can be used by policymakers to influence and alter people's behavior in a predictable way by designing the settings in which they make choices. This technique often involves the manipulation of the information environment by framing and various other presentation strategies (House of Lords, Science and Technology Select Committee, 2011).

### **Information-based designs to control behavior**

While the thrust of Open Government is the idea that the release of reusable data and the creation of digital platforms could create participation and collaborative governance, the nudging government has a completely different aim. It seeks to use information-based strategies in order to influence the choices of citizens. It has a paternalistic foundation and is aimed at constraining human behavior (Yeung, 2012).

Nudges and other behaviorally informed regulatory strategies envisage an external and noncoercive intervention in the decision-making processes of individuals: information is deployed strategically to create pressure on actors in order to secure compliance with rules or to encourage positive choices. Nudge can help us to either avoid unintended consequences or steer our choices. Indeed, there are essentially two distinct categories of nudging. The first is directed at creating or modifying choices in order to "persuade" – like a commercial advertisement that convinces us to buy a product of a specific brand; the second aims to reduce the risk that we forget or misinterpret – like the beep that sounds before we drive a car in order to remind us that seat belts have not been put on.

The mechanism of nudging is the creation of a "design setting" that coaxes individuals to make a predefined choice. The use of default

options or rules is based on the finding that people tend to be subject to inertia and procrastination in making choices. Depending on the difficulty in overriding the default rule, it increases or reduces the social cost in making a *free* choice. In some cases, the freedom of those who are subject to a default rule can be heavily curtailed. In the use of Nudge as a regulatory intervention, it is the framing of the information that is used to influence the decision making. The power exercised by public authorities is in the visualization or delivery of the information.<sup>8</sup> The significance of these strategies is substantially increased with digital technologies. This can be seen in the way data are reconstructed, reframed, and re-elaborated to express a certain meaning, culture, frame of mind, or regulatory objective.<sup>9</sup>

### **The regulatory use of Apps and social networks**

Nudging can be used to make a person amenable to behavioral changes that contribute to positive outcomes. Social norms are often promoted by public administrations in order to encourage a desired behavior, in particular in those circumstances in which it would be impractical to use command-and-control rules or financial incentives. One might, for example, think about the campaign for the prevention of the transmission of the H1N1 flu, which was directed at making users of public transports aware of the relative danger of contaminating fellow passengers through sneezing. The opportunity for public institutions to use social networks or digital tools, such as smartphone “Apps,” in order to nudge citizens scales up the persuasive power of the message to be delivered.

One could also look at the tool programmed by the NHS for encouraging smoking cessation.<sup>10</sup> In this “App,” freely downloadable for smartphones, a user is able to upload essential information about his or her smoking habits (average cost of cigarette consumption). What the App would do is to start a counter that visualizes the amount of “savings” made in the nonsmoking period. This is considered as offering practical encouragement to support the decision to quit smoking. In other regulatory areas, similar tools have been devised to enforce behavioral changes (related, for example, to early repayment of loans, use of energy-saving options, and so on).

Eliminating, by way of information design or visualization mechanisms, contextual information implies a reduction in the ability of agents to make a free judgment based on the relative cost and benefit of a certain choice in a certain context (Bamberger, 2010). Going back to the example of the “Quit Smoke App” referred to above, information on the possibility that the financial resources saved as a result of the

cessation of smoking might have been used for some compensatory, similarly unhealthy habit (for example, an increase in drinking) is not provided.

Knowing the pervasiveness and fluidity of the public and private spheres on the Internet, the use of social networks for governmental activities presents evident challenges. It is, for example, arguable whether the presence of tax authorities on social networks is exclusively justified on the basis of “open government” goals such as providing advice for getting information from the administration on filling out individual tax forms. It cannot be excluded that the online presence of tax authorities serves also the purpose of compliance enforcement, both in the form of verification of declared income with the rich dataset available online and through the targeted promotion of tax compliance behavior (OECD, 2011b).

### **The privacy risks of “open” digital administrations**

With concepts such as Open Government and Nudge transforming the public sphere in modern democracies, digital government is likely to challenge our theoretical understanding of public power (Alemanno and Spina, 2013) and to present new challenges for public administration studies. Digital public administrations and the sharing and use of “Big Data” can undoubtedly bring many benefits to inter alia health care, energy efficiency, and public safety. As the life of citizens becomes increasingly “connected,” and more and richer data regarding different aspects of our lives are online, it is unavoidable that the sphere of activities of public administrations will expand online. As can be seen from their contextual background, Open Government and Nudge represent concurrent and converging trends in the modernization of public administrations. Both of them highlight the centrality that information management, including the management of the linkage between online and off-line information, will play in the future structure of public administrations.

We have seen that the transparency part of the Open Government paradigm is not itself an end, but a means to mobilize the public. Moreover, in this context, the role of public administrations is to manage digital platforms in order to spur collaboration between government and citizens. On the other hand, the frequent interactions between public administrations and citizens and their online presence make it possible to create new strategies to modify the behavior of citizens with nonlegal instruments such as ‘code, nudge, or notice’ (Calo, 2014). These two approaches can be, to a certain extent, mutually reinforcing.

However, by looking at their underlying goals, they presuppose a different relationship between the government and the public, and therefore they could come into conflict.

While in the case of Open Government, “information asymmetry” between public administrations and citizens is reduced by disclosing data to foster collaborative practices – that is why the government is “open” – in the Nudge examples, it is the very “information asymmetry” – the capacity to make use of the knowledge that comes from the correlations and inferences of “Big Data” – that is strategically used by public administrations for regulatory purposes. The key tools used by government in nudging techniques are not only data but also metadata, the essential information about how data are to be used, and what impact they could have on the targeted parties – in other words, how they are processed and internalized in our decision-making process. Framing and visualization strategies presuppose the capacity to influence the information environment in which citizens make choices. The availability of increasing amounts of personal details in social networks makes public administrations able to increase their power to influence behavior.

Moreover, the unsettling of the formal boundaries between public administrations and citizens and the use of Nudge to control behavior highlight that a more interactive and collaborative digital administration may pose a formidable challenge to the right to privacy and freedom. First, the release of more “public” datasets, coupled with the possibility to mix, match, and integrate the data,<sup>11</sup> creates a risk that the processing of aggregated and apparently anonymous data could be subject to sophisticated mechanisms to reidentify the data.<sup>12</sup> Second, it has to be recalled that the availability of more data, collected for different purposes, will make the “profiling” of individuals easier and more common. Recent studies are showing that with the current analytical tools it is possible to predict with a high degree of accuracy individual profiles only by examining digital records left on social networks (Kosinski *et al.*, 2013). One might think of different datasets containing aggregated information about criminal cases and racial communities, or HIV cases, related to a certain geographical area and the effect of correlations that could be made between these different datasets.<sup>13</sup>

This is, of course, not a novel problem, as information-based strategies have a tendency to frame problems with straitjacket solutions. ICTs privilege the processing of measurable and standardized information (Larnier, 2010) to facilitate inferences. The control of the salience and relevance of information visualized is key, as other nonquantifiable, nonstandardized factors are filtered out from the cognitive control.<sup>14</sup> Moreover, unfair and

discriminatory practices might result from the reliance on weak correlations affecting our private sphere. This issue is linked to the difficulty of interpreting the large quantity of raw information available on some matters (Roberts, 2006) and to the verification of the inferences resulting from the analysis of the data. The interpretation of complex data by way of engineered technological platforms (for example, the result of a search of some information through the *Google* algorithm) will make us cognitively dependent on often opaque and/or overly complicated technological platforms in order to understand risks (Lessig, 2009). Measures to address societal risk by way of information-based strategies call for a more refined understanding of how to control this power.<sup>15</sup>

But the main privacy risk of digital administration stems from the combination of both Open Government and Nudge and the potential 'digital tsunami' that could ensue (Rodotà, 2013). Open Government favors the active online participation of citizens and interested parties, and it encourages the aggregation of dispersed data and the sharing of information; in the context of Nudge, the more information that is available about the individuals to be nudged, the more effective and invasive are the strategies that can be used by the government to influence the decision-making process of their targets. As a result, the more personalized the information strategies employed, the more the effectiveness of nudging will increase (Sunstein, 2011). It has to be remembered that the successful products and services of the digital economy, to which supporters of Open Government refer as inspirational models, are in most cases made available by companies whose key strategic business asset is the collection, aggregation, and mining of users' data (Rodrigues, 2010).

The considerations developed in this chapter do not suggest an outright dismissal of either Open Government or Nudge, or both of these important trends of modernization of public administrations, but rather a more profound reflection on what role governments should play in increasingly transparent and digitally connected societies in order to preserve the fundamental values of our modern democracies, such as privacy and freedoms.

## Notes

The views expressed in this chapter are solely those of the author and should not be attributed to any institution or organization.

1. Borrowing from cybernetic studies, regulation is represented as a process composed of three phases: standard setting, information gathering, and behavior modification (cf. Hood *et al.*, 2001).

2. In the EU, Article 15 of the Treaty on the Functioning of the European Union states that: '(1) In order to promote good governance and ensure participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible' and '(3) Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies [...]' (European Union, 2007).
3. The most advanced experience is in the United States, where the Obama Administration has made Open Government one of its main policy objectives (cf. the official website of the US Government, [www.data.gov](http://www.data.gov)).
4. It is worth noting that much controversy and surprise was generated by the finding that Wikipedia is as accurate as the *Encyclopedia Britannica* with regard to science information, rebutting one of the most popular objections as to the reliability of information in encyclopedias everybody can edit (cf. Giles, 2005).
5. See <http://peertopatent.org>.
6. In December 2011, the European Commission presented the program for the Open Data Package, comprising a *Communication on Open Data* (European Commission, 2011b), and a proposal to strengthen the current legislation on the reuse of public data, Directive 2003/98/EC (European Union, 2003a). In principle, the proposed measures do not seem to introduce major changes in the current framework; they merely stress the presumption of openness of certain data, include educational and research establishments in the scope of application, and introduce the requirement that data are released in a machine-readable format.
7. Indeed, there is an ongoing revival in the popularity of public contests with financial prizes and honorary awards as incentives to stimulate creative solutions, for example, [www.challenge.gov](http://www.challenge.gov).
8. Lawyers tend to disregard nonbinding acts of public administrations, as they are erroneously believed to not be able to have a negative effect on the legitimate interests of citizens. However, informational power seems to be exercised also in FAQ documents on websites, which present a cognitive framing of the problem.
9. It is interesting to see in practice that the cultural options of the information architects have a clear impact on the visualization mechanism. For example, the website [www.goodguide.com](http://www.goodguide.com) offers an easy-to-read ranking of products. Users of the website can set up their preferences (in other words, if they care more about corporate social responsibility or environmental policies) in order to receive tailored rankings of product.
10. See <http://smokefree.nhs.uk/quit-tools/quit-app/>.
11. This is what is generally called the "repurposing" of data, which occurs when data collected for a specific purpose are used for a different purpose. Let us take the example made above of the NHS Quit Smoke Apps: if the system had a data collection system for monitoring the downloads, to ensure proper functioning and distribution of the service, it could also use the collected "geographical" data to infer the areas of the territory where there is more public interest in smoking cessation activities.
12. See, for example, the European Data Protection Supervisor's *Opinion on the "Open-data Package" of the European Commission Including a Proposal for a*

*Directive Amending Directive 2003/98/EC on Re-use of Public Sector Information* (EDPS, 2012).

13. A declaration on “profiling,” highlighting the risks that it creates for the privacy of individuals, was adopted at the 34th International Conference of Privacy and Data Protection Commissioners and is available at: [http://privacyconference2012.org/wps/wcm/connect/7b10b0804d5dc38db944fbfd6066fd91/Uruguay\\_Declaration\\_final.pdf?MOD=AJPERES](http://privacyconference2012.org/wps/wcm/connect/7b10b0804d5dc38db944fbfd6066fd91/Uruguay_Declaration_final.pdf?MOD=AJPERES) (Uruguay Declaration on Profiling, 2012).
14. The aforementioned Quit Smoke App does not offer visualization of any other information, other than financial savings, about potential positive aspects of smoking cessation, such as an increase in the well-being of the individual. In this way, the activity of smoking cessation is channeled exclusively by financial incentives (cf. Marteau *et al.*, 2009).
15. As shrewdly pointed out:

It is not just about us becoming dependent on the mobile phone/computer for our communication, it is not only about transaction passing through digital networks; it is not about jobs being automated; or human reasoning being replaced by expert systems. Looking at the next development of ICT platforms and risk management, the challenge emerging on the horizon is that the *unfolding of our life (experience) becomes simultaneously conditioned, constrained or enabled by grid technologies*. (Emphasis added, Ciborra, 2004)

# 12

## Collaborative Governance and Collaborating Online: The Open Government Initiative in the United States

*Lisa Blomgren Amsler and Susanna Foxworthy*

### Introduction

On his first full day in office, President Barack Obama signed an Executive Memorandum committing to create ‘an unprecedented level of openness in Government’ and ‘a system of transparency, public participation, and collaboration’ to strengthen democracy, ensure the public trust, and ‘promote efficiency and effectiveness in Government’ (White House, 2009). The theory behind this Open Government Initiative (OGI) was three-fold: transparency promotes accountability and provides information for the public, participation enhances government effectiveness and the quality of decision making, and collaboration engages Americans in the work of their government. This movement has expanded internationally; there is now an Open Government Partnership among a community of nations (Open Government Partnership, 2012).

The Office of Management and Budget (OMB) developed the Open Government Directive (OGD), directing federal agencies to publish government information online, improve its quality, institutionalize an open culture, and create an enabling policy framework (Bingham, 2010; McDermott, 2010). In 2009, all federal agencies adopted Open Government Plans (OG 1.0) and engaged in innovative experiments to implement the Directive, largely focused on transparency and online public consultation. In April 2012, federal agencies submitted revised Open Government 2.0 (OG 2.0) plans outlining activities for the 2012–14 period.

Although the open government rhetoric has exceeded actual results, it has driven some changes in how agencies relate to the public online. This chapter examines OG 2.0 in the US federal government. First, it will briefly introduce collaborative governance and how it relates to



the OGI. Second, it will focus on what the OG 2.0 plans promise and assess what progress they make toward more collaborative governance with the public and other stakeholders. It concludes with some recommendations.

### **The relation of collaborative governance to open government efforts**

Collaborative governance requires new procedures and structures in the institutional order of the state and public administration; it reflects the demands of citizens for more transparency and participation in government decisions. The transparent state and the participatory state are interrelated. The state must provide information and create effective networks and collaborative or participatory processes to enable the citizen to engage in the coproduction of public goods in a meaningful way. This, in turn, may contribute to improved trust and perceived legitimacy of government. Within the domestic US context, we define participatory and collaborative governance as engaging the general public, as well as state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other nongovernmental stakeholders, in the policy process through methods including but not limited to public involvement, civic engagement, dialogue, public deliberation, public consultation, multistakeholder collaboration, collaborative public management, dispute resolution, and negotiation (Bingham, 2010).

Agency use of these processes varies across the policy continuum, shown in Figure 12.1, which includes upstream legislative and quasi-legislative action to make policy, midstream implementation of policy, and downstream enforcement of policy (Bingham *et al.*, 2005).

Within the executive branch, the OGI has focused upstream in the policy process on quasi-legislative and implementation activities and online interactions. Agencies have provided opportunities directed at the self-selected diffuse public rather than representative or random samples of the public or stakeholder groups (for a discussion of varieties of participatory governance, see Fung, 2006). Few of the plans include collaborative public or network management, such as networks of public, private, and nonprofit stakeholders working together to accomplish a task that none of the players could achieve alone (for example, Agranoff and McGuire, 2003; Agranoff, 2007; Bingham and O'Leary, 2008; O'Leary and Bingham, 2009), nor do they address policy enforcement through negotiation and dispute resolution (Bingham, 2009).

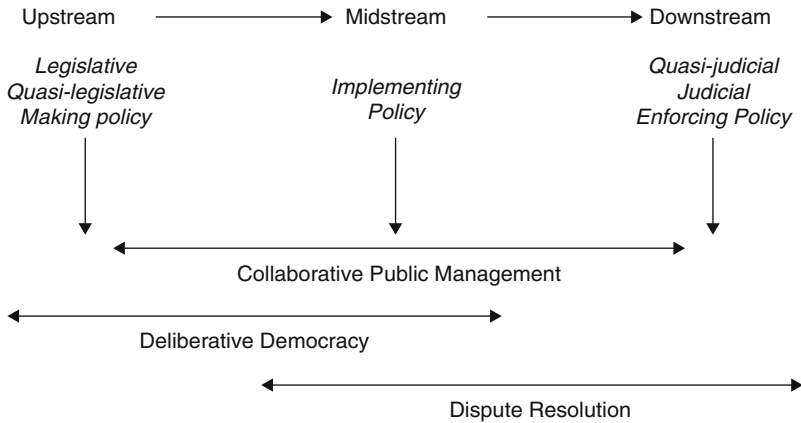


Figure 12.1 The policy continuum and collaborative or new governance

Upstream in policymaking, the public has played a fairly limited role apart from the electoral process of voting for representatives. While variations of the phrase “public participation” appear in hundreds of sections of the US Code, there is no comprehensive definition (Bingham, 2010). Based on requirements for notice and comment for rulemaking in the Administrative Procedure Act (5 U.S. Code 551, *et seq.*), agency default modes for engaging the public are either written comments or traditional public hearings in which participants get a few moments at a microphone. OG 1.0 started to change this pattern by suggesting that technology can help agencies use ideas for policymaking and implementation that originate with the public; a National Academy of Public Administration study suggested this turns the traditional pattern on its head by asking the public for ideas before the agency commits to a position (Trudeau, 2009).

## Assessments of OG 1.0

In a report commissioned by the IBM Center for the Business of Government, Lukensmeyer *et al.* (2011) found that most original OG 1.0 plans failed to offer standards or measurements for more meaningfully engaging the public, did not sufficiently experiment with ways of obtaining meaningful input, did not demonstrate how public input will affect the policy process and its outcomes, and did not ensure that citizens and stakeholders could help set the agenda for important issues for public comment. While the plans increased the number of people

who participate, they did not ensure diversity. While the plans did provide for releasing raw datasets on Data.gov, they did not provide for sharing sufficient policy information to enable the public to participate meaningfully. The plans provided online and some in-person participation. A US Government Accountability Office (GAO) report on Web 2.0 technology use by federal agencies found that by July 2010, 22 of 24 agencies used Facebook, Twitter, and YouTube (GAO, 2010). However, they did not generally use deliberative forums. Moreover, researchers concluded that the plans did not incorporate strategies for embedding a culture of participation in the agencies (Lukensmeyer *et al.*, 2011).

The Congressional Research Service (CRS) found that there was no enforcement mechanism in OG 1.0 to ensure agency compliance (Ginsberg, 2011). Most of the information released through transparency initiatives concerned entities that agencies regulate, not the internal operations of agencies themselves (p. 29). The CRS identified opportunities for Congress to codify elements of the OGI, create incentives for compliance, and incorporate transparency policies into the US Code; however, it cautioned that new transparency policies might put classified information at risk. The CRS also reported that a working group that OMB officials were directed to create to address transparency, accountability, participation, and collaboration did not require the inclusion of any members from the public (p. 32).

The consensus seems to be that the OGI, in its 1.0 phase, made important strides in transparency and using technology to engage the public. However, research found very little evidence of the quality of public engagement, its deliberativeness, or the level of true collaborative activity with citizens and stakeholders.

## **Participation and collaboration online with the public and stakeholders: what little we know**

Although the Executive Memorandum is not written this way, in practice the OGI has evolved primarily into varieties of e-government (see definition in Hu *et al.*, 2010). Some have suggested that e-government evolves in stages: disseminating information, providing online transactions, vertically integrating service delivery, and horizontally integrating a variety of functions (Brainard and McNutt, 2010). Current e-government research focuses on the efficiency and usefulness of government websites and blogs (Kim *et al.*, 2009; Morgeson and Mithas, 2009; Wood *et al.*, 2009; GAO, 2010; Merry, 2010; Ahn, 2011). Research also cites concerns about equality of broadband and Internet access

across the digital divide (Chen and Hsieh, 2009) and generational divide (Lariscy *et al.*, 2011). In addition, research has focused on the design and implementation of online interaction (Delborne *et al.*, 2011; Coleman and Shane, 2012).

Astrom and Gronlund conducted an important meta-analysis, or case survey, that examined 58 European and US case studies regarding online consultation (2012). Research literature defined success in online consultation based on criteria that included representativeness, early involvement, transparency, independence, and influence. The authors were interested in testing three different claims about the key elements for online consultation success: (1) that it was a function of institutional design; (2) that it depended on organizers' strong democratic intentions; and (3) that it depended on the rigor of research as part of the process design. They identified eight different factors:

- *Participant selection*: (1) voluntary self-selection and (2) random or strategic sampling method;
- *Stage in the policy cycle*: (1) early stage and (2) analysis or decision stage;
- *Deliberative mode*: (1) express preferences and (2) deliberating on preferences or aggregating preferences;
- *Media mix*: (1) online only and (2) online plus offline/in-person;
- *Democratic intentions*: (1) strong and (2) mixed;
- *Evaluation timing*: (1) early and (2) after a project had matured;
- *Research involvement*: (1) independent researchers and (2) researchers involved with organizing the process; and
- *Content analysis of the online consultation as a research tool*: (1) present and (2) absent.

A significant and disheartening finding of this study is that there is an overall high rate of failure across all conditions and criteria, the mode being somewhere in the 40 per cent range (Astrom and Gronlund, 2012, p. 82).

However, there were also heartening findings. Astrom and Gronlund (2012) found that online consultations succeed in attracting more participants when there are strong democratic intentions combined with strategic or random selection of participants rather than open self-selection, when consultation occurs at the policy analysis or decision-making stage rather than too early in the policy process, when there is a deliberative mode of communication rather than simply expressing preferences, and when there is a combination of online and offline

processes (pp. 85–6). Under these circumstances, the failure rate is below 22 per cent; under the opposite circumstances, the failure rate is between 56 and 64 per cent. Using multivariate logistic regression methods, the authors found systematic patterns supporting the three hypotheses that consultation design elements, strong democratic intentions, and rigorous research as part of the design of the process all contributed to success. In light of these research findings, it is interesting to examine what federal agencies chose to do in their OG 2.0 plans.

### **Federal agencies broaden online interaction in OG 2.0 plans**

Lee and Kwak (2011) suggest a four-stage implementation model for OGI: (1) increasing data transparency; (2) improving open participation; (3) enhancing open collaboration; and (4) realizing ubiquitous engagement. Based on this model, it appears we are still in stage two with the OG 2.0 plans: at best, they improve open participation.

We analyzed all the OG 2.0 plans available as of 1 January 2013. OG plans are structured as living documents for national agencies with divergent missions; thus, they vary widely in how they construe and implement transparency, participation, and collaboration. Some agencies focus on service delivery and website enhancements while others continue to develop their OG 1.0 proposals. In the opening sections of the OG 2.0 plans, agencies described their accomplishments from OG 1.0, including the following:

1. Release of datasets on Data.gov, the official website of the US government with the purpose of increasing public access to data generated by federal agencies.
2. Development of a social media presence. Agencies reported increased use on Facebook, Twitter, and other social media platforms.
3. Reporting of expenditures on Recovery.gov, a searchable database that tracks where tax dollars are spent related to the Recovery Act; USAspending.gov, a searchable database that provides information on federal awards; and the Federal IT dashboard, a website that tracks the information technology (IT) investments made by federal agencies.
4. Posting of rules for comment on Regulations.gov, a portal for federal rulemaking that allows the public to comment on federal documents that are open for comment.
5. Progress on clearing backlogs on requests for records under the Freedom of Information Act, a law that gives citizens the right to access information from the federal government.

In the OG 2.0 plans, agencies plan to focus their efforts primarily on using IT to elicit help from the public and stakeholders in order to accomplish their mission; however, there is limited genuine deliberative public engagement, collaboration, or coproduction of public services and/or policy. We found six trends, arrayed generally from less to greater collaboration with the public and stakeholders: (1) competitions or awards, (2) enhanced or collaborative transparency, (3) App sharing and development, (4) wikis or knowledge development across sectors, (5) online engagement for policy development through social media, and (6) platform spaces or Apps for collaboration. See Table 12.1 for percentages of agencies participating in each form of participation and collaboration. The following section will highlight key examples of each form.

### Competition and awards

In 2009, President Obama called on agencies to increase their ability to promote innovation by using tools such as prizes and challenges. In response, the General Services Administration (GSA) created an online platform (Challenge.gov) through which agencies can post challenges and competitions. In the 2.0 plans, a majority of the agencies plan to participate in competitions to increase citizen participation and invite innovation.

Many of the competitions involve fairly low levels of public engagement. For example, the Department of Transportation (DOT) plans to administer the Distracted Driving Design Challenge (<http://www.distracted.gov/content/challenge.html>) to engage high school students to spread the word on distracted driving by designing a creative icon to share on social networks.

In contrast, the National Aeronautic and Space Administration (NASA)'s Centennial Challenges Program exemplifies a higher level of

*Table 12.1* Per cent of executive branch agencies engaging in methods of public participation and collaboration

Type of engagement	Per cent participating
Online engagement for policy development	100
Competition/awards	80
Enhanced transparency/collaborative transparency	72
Wikis/knowledge development across sectors	52
Platform spaces/Apps for collaboration	48
App sharing/Apps development	48

engagement. In 2011, NASA awarded \$1.35 million for the Green Flight Centennial Challenge to individuals to develop a more fuel-efficient aircraft. The first and second place teams in this challenge achieved twice the standard fuel efficiency, and NASA plans to continue these competitions. This NASA program moves beyond public awareness to leveraging public work to achieve agency goals.

### **Enhanced transparency**

Making vast quantities of agency data more accessible to the public may enhance transparency, accountability, and access (Roberts, 2006). Computer-mediated transparency has proponents who believe that it gives the public better information, helps society make more rational decisions, and leads to democratic and more affluent societies; critics argue it may create a flood of unsorted information leading to uncertainty (Meijer, 2009). In OG 1.0, agencies published high-value data but did not use common formats or fields. In OG 2.0, a number of the agencies plan to make data user-friendly, visual, and standardized. The National Science Foundation (NSF) proposed a data standardization initiative, and the Environmental Protection Agency (EPA) plans to create a Freedom of Information Act Module creating one point of access for information requests for all agencies. Another example is the Department of Energy (DOE)'s Beta Website (<http://www.eia.gov/beta/>), which allows citizens to test and comment on data visualization enhancements. This crowdsourcing technique provides the DOE with valuable feedback on its datasets and the most effective methods for presenting data.

For the most part, these programs represent creative improvements in transparency, but generally do not rise to the level of collaborative transparency, in which the public helps create the data and interacts with it in a way that drives policy implementation and social change (Fung *et al.*, 2007).

### **App sharing and development for service delivery**

Applications (Apps) on computers, smartphones, and tablets can engage citizens in information gathering and sharing. Apps may enhance open government efforts by making data more accessible and allowing citizens to provide feedback more easily. In OG 2.0, many agencies show signs of embracing App development, either through competitions or through ongoing improvements to Apps developed in the 1.0 stage.

The Department of Interior (DOI) proposed the National River Atlas, a web-based multimedia project that allows citizens to learn about the

nation's river resources to support river recreation and restoration and help communities in developing the National Blueways System, an initiative to help protect and restore the nation's rivers and watersheds. The Atlas will have a geospatial tool that allows individuals to monitor and learn about restoration in waterways across the country. Another goal of the tool is to improve coordination among DOI bureaus and engage stakeholders in learning about restoration priorities. This initiative moves closer to notions of collaborative governance as citizen coproduction of public goods.

### **Wikis or knowledge development across sectors**

Wikis are websites where content can be created, edited, and discussed in collaboration (Noveck, 2009). Their uses by government include for open information creation environments, personal note taking or full-fledged knowledge management systems, and other specific purposes where authorship rights may be limited (Mergel, 2011). Some agencies intend to improve upon or maintain wikis from OG 1.0, including the Department of Defense's DoDTechpedia and the GSA's Better Buy Wiki.

In the 2.0 plans, many agencies propose to develop new platforms for knowledge development for the public, other agencies, nonprofits, and for-profit organizations. This indicates that agencies find education regarding their services and expertise important from a public relations standpoint, and that they recognize these tools can allow citizens to better contribute to policy development.

For example, the DOE's National Training and Education Resources (<https://www.nterlearning.org/home>) is a web-based learning platform that organizations can use to train and certify people in a variety of topics. Its goal is to provide high-quality education resources for teachers to integrate into their curricula, including modules on green energy and attic air sealing. Additionally, the DOT's Safety.data.gov initiative seeks to build a safety community that will include forums, blogs, discussions, and data. The website includes datasets on transit injury statistics and state traffic safety information. There are also Apps available, and state and local governments can use its information to improve safety.

### **Online engagement for policy development using social media**

Several nongovernmental organizations (NGOs) have already assessed the OG 2.0 plans and critiqued their use of public engagement (Center for Effective Government, 2012; OpenTheGovernment.org, 2012). Engaging citizens in policy development is a critical aspect of a truly open and



democratic government (Sirianni, 2009). Currently, all agencies post rules on Regulations.gov, and citizens can comment as part of informal rule-making under the Administrative Procedure Act (5 U.S.C. Section 551, *et seq.*). This is not ideal because participation is entirely by self-selection and communication is one way and not deliberative.

If agencies want citizens to take ownership of policy issues, tactics such as digital workspaces and large-scale deliberation are more effective (Leighninger, 2011). Examples of current engagement include using citizens to gather, rank, and identify ideas through platforms such as IdeaScale, a tool the White House used as part of the Open Government Dialogue (Bingham, 2010). In addition, some agencies are using social media in an effort to achieve more interactive public engagement. US Secretary of Education Arne Duncan plans to continue engaging in Twitter Townhalls with the public, in which followers are invited to join a Twitter chat at a certain time and ask questions that the Secretary responds to directly. This initiative allows the agency to gain insight into public opinion and succinctly respond in real time.

The Department of Housing and Urban Development (HUD) is currently planning Ideas in Action, a platform powered by UserVoice that allows people and employees to share ideas in response to a question, discuss ideas, and vote on the top suggestions. Unlike Regulations.gov, it allows citizens to provide direct feedback and ranking upstream in the policy process, before rulemaking.

### **Platforms, spaces, and Apps for collaboration**

Although the OG 1.0 plans paid lip service to collaboration, the OG 2.0 plans reveal a stronger emphasis on collaboration. Agencies are building the infrastructure for creating partnerships between agencies, organizations, and the public. The goal for most collaborative efforts is to enhance service delivery by the agency, invite innovation from outside sources, or gather ideas from stakeholders.

NASA plans to restructure its entire web environment to make it cloud-based and open source. This will free NASA data and applications for open source use by individuals and organizations. Currently, the agency administers a portal (<http://code.nasa.gov/project/>) through which individuals can access open source software. NASA is working on building a public repository for collaborative code that will allow developers and individuals to more easily access and use NASA technology in order to collaborate on projects. Building an open source structure is critical for web-based collaboration because it removes the barrier of proprietary programs that can hinder innovation.

Another example is the Department of Commerce's BroadbandMatch Tool, a product that provides a repository for Recovery Act grant recipients to find potential partners such as broadband content providers and large-scale institutions. For example, a small nonprofit that receives a grant can access this tool, search for institutions, and then contact them to seek a partnership. This initiative provides a platform for organizational collaboration, as well as encouraging more sustainable use of grant money.

## **An assessment and recommendations**

Although the OG 2.0 plans suggest we are still in stage two – open participation – of an open government implementation model (Lee and Kwak, 2011), agencies can take steps toward more deliberative, participatory, and collaborative governance as they implement the OG 2.0 plans. They can use better design principles for public engagement, make engagement through competitions and challenges more meaningful, identify programs to use the new collaborative platforms, and integrate coproduction into agency initiatives.

### **Use better design principles for public engagement**

Research suggests that better design of public engagement processes makes a difference in their success or failure, particularly in online processes. Assuming you seek success in participation, deliberativeness, and impact on policy, best practice in design includes having a random sample or targeted selection for participants, deliberative processes, mixed online and in-person designs for policy analysis and decision making, and rigorous evaluation (Astrom and Gronlund, 2012).

In contrast, the 2.0 plans contain many ways to engage the public through social media, online policy consultation, and stakeholder groups without evidence of best design practices. OGI 2.0 plans suggest presenting information for feedback on platforms such as IdeaScale and Regulations.gov are online only, use self-selected participants, and provide limited opportunities for deliberative interaction. IdeaScale uses a voting and comment tool for participants to react to each other's ideas, while Regulations.gov is not structured to elicit deliberative exchange in any form.

Moreover, it is often unclear how or whether the agency will use participants' contributions in decision making. Public choice theory suggests that this can lead to the phenomenon of rational ignorance (Downs, 1957, cited in Astrom and Gronlund, 2012, p. 89). When

potential participants are uncertain of the outcome of participation, the costs in time, effort, and resources of collecting information to participate outweigh perceived benefits. For example, items posted on Regulations.gov sometimes prompt few, if any, responses. Self-selection also allows the skewing of responses to policy issues that favor special interests and does not ensure diverse public representation.

Astrom and Gronlund (2012) have presented substantial evidence that random or representative samples are better designed, more successful, and a more representative means of gauging public opinion on policy topics. America Speaks, a nonprofit organization that holds online and in-person or mixed media town halls and conferences across the nation, integrates diverse representation into their core principles when designing large-scale deliberations, thereby ensuring a fuller perspective of citizen opinion ([www.americaspeaks.org](http://www.americaspeaks.org)). Deliberative polling uses random samples and mixed online and in-person methods to generate information that policymakers can use (Fishkin, 1995).

To learn from open government experiments, we need rigorous policy analysis and program evaluation (Nabatchi, 2012). There is evidence that building evaluation into public engagement enhances accountability of the participants and helps the engagement process impact agency decision making. As agencies implement their OG 2.0 plans, they have the discretion to use better design principles for online public engagement, including random or purposive sampling of participants, affording them opportunities for online and in-person deliberation, and building meaningful longitudinal research into the design to determine the impact of the public's participation.

### **Challenge the public to do meaningful projects**

Many agencies discussed using Challenge.gov in their 2.0 plans as a way to involve the public in creating innovative solutions to policy problems. However, a number of agencies only engage the public through public relations events such as photo contests. It is possible to engage the public in more meaningful ways. For example, NASA and the Department of Defense offer large cash prizes and ask the public and stakeholders to solve significant issues. For agencies that do not focus on technology-based competitions, challenges could involve the development of strategic plans or innovative research, or the collaborative creation of useful datasets with the public. Ultimately, more significant competitions and awards have the potential for agencies and the public to coproduce the tools or solutions we need for technological and policy problems.

### **Build on infrastructure to create collaborative programs and evaluate them**

Currently, many collaborative initiatives focus on building infrastructure or platforms for collaboration, but agencies do not clearly address the programs that will result from them or how they will encourage public participation. NASA plans to rework its entire web infrastructure to become open source. Other agencies working on similar collaborative platforms (for example, DOT and its Collaborative Workspaces initiative) should develop means to test and integrate measurable programs for collaboration. They could use challenges and competitions to have the public help develop ways to use the infrastructure. This has the potential to greatly increase collaboration across sectors.

### **Integrate coproduction into Open Government Plans**

Sirianni (2009) describes how it is possible for agencies to collaborate with the public and stakeholders to produce public work, something he terms coproduction. Bovaird *et al.* expand on this in Chapter 7 by examining the motivations that inspire citizen coproduction. Federal agencies can catalyze partnerships with the public. For example, the EPA uses members of the public to help monitor environmental conditions on the ground as part of enforcing the conditions of cleanups or permits.

A few agencies showed signs of moving toward coproduction to create innovative solutions for service delivery. For example, the Alva Edison Visiting Professionals Program, administered by the Department of Commerce Patent Office, allows distinguished intellectual property professionals and academics to devote up to six months to the agency on a full-time basis. The Department of Commerce Patent Office administers Peer-to-Patent, in which volunteer scientists and experts help assess pending patent applications. Health and Human Services administers the Innovation Fellows Program, to bring external experts and entrepreneurs on board to innovate, experiment, and take on the department's challenges. In all of these programs, citizens participate at a much more integrated level than offering feedback or ideas on policy issues. These initiatives are promising for fostering partnerships between agencies and the public; other agencies might consider similar programs.

### **Conclusion**

US government agencies presented a diverse set of programs and initiatives in their OG 2.0 plans. Some agencies showed promising developments in moving toward public engagement and collaboration while

others fulfilled minimum obligations or failed to even release a 2.0 plan by the appointed deadline. These are living documents; each agency has the opportunity to innovate and move toward more open government. The public can contribute to the work of government through appropriately designed initiatives. As agencies implement their OG 2.0 plans, they should use what research teaches us about design in order to achieve more collaborative governance and a more open and transparent state.

# **Part V**

## **Multilevel State**

# 13

## Reforming Public Administration in Multilevel Systems

### An Evaluation of Performance Changes in European Local Governments

*Sabine Kuhlmann, Stephan Grohs, and Jörg Bogumil*

#### **Introduction**

The reallocation of public tasks is a common reform strategy in most of the Western European states. On the one hand, there is a trend toward decentralization, on the other also some centralizing measures. Next to the appraisal of decentralization seen in some strands of the literature (see the next section), a comparative view offers a more nuanced angle. If we take into account that the actual strategies of decentralization, the fiscal measures, and the specific nature of delegated functions vary significantly across countries and regions, some differentiation is to be expected regarding the effects of such measures. Against this backdrop, we seek to analyze decentralization policies in Germany, France, and the United Kingdom.<sup>1</sup> In these three countries, varying decentralization strategies have been pursued, the impacts of which partly confirm and partly disprove common assumptions. Taking an evaluative approach, we seek to identify the conditions under which decentralization fulfills the promises (transparency and accountability, efficiency gains, improved citizen-centered services, better coordination, and service quality) that have made it one of the most prominent reform strategies worldwide (Treisman, 2007).

This chapter proceeds as follows: we will attempt first to introduce the reader to the theoretical debates on intergovernmental relations, decentralization, and performance impacts. After a brief overview of the methodology and the analytical framework adopted for our empirical research, we will present the empirical results of our comparative study of the effects of decentralization. The conclusion presents a differentiated view on the virtues and vices of decentralization.

## Effects of decentralization: theoretical framework

A wave of enthusiasm tends to accompany the international discussion on decentralization. It promises to bring the state closer to the citizen, to enhance efficiency and effectiveness in the provision of public services, and to promote accountability and participation (for an overview, see Treisman, 2007, pp. 1–14). The international scientific discourse on local government and public administration is almost unanimous in seeing a global trend toward the decentralization of state functions (Stoker, 1991; Pollitt and Bouckaert, 2004; Denters and Rose, 2005).

Nevertheless, the arguments and findings on the effects of decentralization are extremely contradictory (cf. Pollitt, 2005; De Vries, 2000; Treisman, 2007). Drawing on both theoretical arguments and empirical evidence, we can find support both for positive effects and for negative effects in almost all dimensions amenable to evaluation, such as effectiveness, efficiency, horizontal or vertical coordination, democratic control, or equity (for an overview, see Grohs *et al.*, 2012, p. 127). In order to reconcile these divergent and strikingly contradictory assessments, it has been proposed that it is not so much decentralization itself that impacts and differentiates performance but rather the manner of implementing the decentralization agenda (cf. De Vries, 2000, p. 200; Treisman, 2007, pp. 21–6) – in conjunction with the specifics of the policy domain (cf. Ostrom and Bish, 1977; De Vries, 2000, pp. 200–1).

Our objective here is to attempt to identify the specific conditions that impact the outcomes of decentralization. In the course of doing so, we differentiate between institutional factors (type of decentralization mechanism), policy-specific actor strategies regarding implementation, and other contextual factors (administrative culture, economic and social environment). We distinguish three basic decentralization types, which can also diverge into different variants and “subtypes” (cf. also Benz, 2002, p. 209ff; Wollmann, 2006).

1. *Political decentralization* is the complete transfer of state functions to local administrative bodies. In this process, a democratically elected local representative organ is given full responsibility over planning, financing, and administration of the new task. This brings decision making closer to the citizens, safeguarding transparency and participation.
2. *Administrative decentralization* is a more moderate type of the transfer of functions. In this case, the elected local representative organs do not receive autonomous decision-making and control competencies



in the course of the delegation of functions. Local authorities function as agents of the state and continue to be subject to its legal and expert supervision.

3. *Administrative decentralization* involves the transfer of central government functions to authorities or other statutory public sector bodies that are located at the subnational administrative level but continue to be part of the organizational structure of the state government system, in the broader sense.

The institutional effects of the various forms of decentralization relate to two basic models of administrative organization: the multipurpose model and the single-purpose model (Benz, 2002; Wollmann, 2006). Whereas the multipurpose model implies a horizontal form of administrative organization in one territorial jurisdiction, the single-purpose model is geared toward a vertical, functionally specific type of administrative organization. In the former, the local government consolidates all operational tasks related to its territorial unit and performs the inherent functions with its own political mandate. In the latter model, functionally differentiated and highly specialized units take care of all issues related to their responsibility. Both of these ideal-type configurations are seen as being responsible for certain specific effects on the provision of services and on performance in general. In line with this view, the multipurpose model favors the coordination of specialized departments and the creation of uniform decision-making processes in administration. There is also a prevalent belief that the multipurpose model reinforces democratic control since the shaping of a broad spectrum of policy functions can be influenced and controlled directly by the citizens or their council representatives. More negatively, the multipurpose model is assumed to provide little scope for the development of specialized expertise within local administrations and it, therefore, can lead to shortcomings in efficiency and effectiveness (Wollmann, 2006). Conversely, the impacts of the single-purpose model are believed to possess the inverse characteristics.

Applied to the three decentralization types, the following effects could be expected: *political decentralization* is assumed to have a particular ability to strengthen both democratic control and the horizontal coordination between different functions. At the same time, coordination and equity among constituencies, as well as administrative capacity as such, are weakened due to declining economies of scale. In contrast to political decentralization, *administrative decentralization* is expected to lead to a reduction in the occurrence of both positive and negative

*Table 13.1* Assumed performance effects of various decentralization models

<b>Performance dimensions</b>	<b>Political decentralization</b>	<b>Administrative decentralization</b>	<b>Administrative deconcentration</b>
Effectiveness	+/-	+/-	+/-
Efficiency	+/-	+/-	+/-
Horizontal coordination	+	+	-
Vertical coordination	-	0	+
Democratic control and transparency	+	0	-
Equity between local governments	-	-	+

Legend: “+” means “increase”; “-” means “decrease”; “0” means “no change”; “+/-” means “partial increase/partial decrease”

effects. Lastly, the opposite effects as are expected for political decentralization are anticipated in the case of administrative deconcentration (Table 13.1).

In all three models of decentralization, the nature of the policy under consideration is expected to matter. From the perspective of the public and other stakeholders, policies differ in political saliency and hence face varying demands regarding input–output standards of legitimacy (Scharpf, 1999). As a result of this, political decentralization in contexts such as service delivery to individual persons may be more visible and hence might have a more straightforward impact on the perceived performance as compared with – for instance – services rendered in the technical field.

## Research design and methodology

Our aim is to contribute to the question of how decentralization affects the performance of public task fulfillment in local government jurisdictions by a three-country comparison. With regard to the dimensions for evaluation, the study draws on the dimensions common in current research on institutional reform policies: effectiveness, efficiency, horizontal coordination, vertical coordination, democratic accountability, and cross-municipal homogeneity and comparability of service provision (see Pollitt and Bouckaert, 2004; Kuhlmann and Wollmann, 2011, pp. 490–1). We explore two local policy domains in each country. Those policy domains entail, on the one hand, citizen services, particularly social services and education and, on the other hand, technical and

regulatory tasks, including the environmental protection services and spatial planning–related functions of the local administrative bodies. Even if no hard comparative performance data can be gathered on all dimensions, a qualitative assessment of the developments is possible. To do so, we rely on document analysis and expert judgments that could be gleaned from case studies in the three countries and a comprehensive evaluation of the available secondary data in the respective national and local contexts. Several different stakeholder groups (local heads of departments, state supervisory boards, local interest groups, and so on) were included in the sample of interviewees. In the course of the field research, a total of 80 interviews were conducted with selected experts on the local level and in upper-level state agencies in the years 2007–9.

Germany, France, and Great Britain<sup>2</sup> are excellent cases for research into performance impacts of decentralization policies. Over the past two decades, a series of restructurings of intergovernmental relations have been pursued in all three countries. However, the three countries started out from quite different points of departure: Germany and England traditionally belonged to the multipurpose model. France, on the other hand, has featured as an example of a country oriented toward the single-purpose model. Furthermore, the types of decentralization pursued varied considerably across countries, so we can control for institutional effects (for details, see Kuhlmann *et al.*, 2011).

### **Results of decentralization: do institutional reforms make a difference for performance?**

In this section, we present a comprehensive summary – in a very condensed form – of the case studies conducted.<sup>3</sup> Herein, the effects of three basic decentralization typologies, namely, *political decentralization* (a), *administrative decentralization* (b), and *administrative deconcentration* (c) will be analyzed comparatively. In all three countries, *political decentralization* measures can be found. These are the social welfare assistance program for the long-term unemployed (RMI) and urban planning in France, the integration assistance program for people with disabilities in Germany (Baden-Württemberg), and local planning in England. The approach of *administrative decentralization* will be analyzed in the case of environmental administration (emission control) in Germany (Baden-Württemberg). Lastly, *administrative deconcentration* is analyzed in the English cases of the school administration and regional planning. In the following, we analyze the decentralization impacts according to the aforementioned six performance dimensions (see Table 13.1).

## Effectiveness

Regarding effectiveness, we are first concerned with questions of professional quality, substantive goal attainment, and improved citizen orientation.

- (a) *Political decentralization*, according to our research results, leads to improvements in technical fields such as planning. In France, this finding can also be partly explained by the time that has passed since decentralization in the 1980s – which has allowed for the growth of administrative professionalism in the big and medium-sized cities. In the case of English local development frameworks (LDF), the effectiveness of planning administration at the district levels has improved and managed, in effect, to gain increased autonomy.

In the field of personal services, by contrast, political decentralization efforts have led to improvements in effectiveness only under certain locally specific conditions. The interests of local actors and the political preferences of officials charged with the execution of local functions have been identified as the fundamental triggers for this variance, as in the case of the integration assistance program (for people with disabilities) in Germany (Baden-Württemberg).

Also in the RMI case in France, the effectiveness of decentralization cannot be explained independent of the parallel policy reform. No significant improvements resulted from the reform initiatives in this case. The problem was essentially linked to the fact that the *Départements* needed to reorganize and undertake drastic organizational and skills-oriented measures in order to reconcile their parallel engagements in both institutional and policy reform processes. On the whole, after overcoming the initial problems of readjustment, improvements can be expected in the future.

- (b) The German approach of *administrative decentralization* within the technical policy regime of emissions control has led to a deterioration of implementation quality. The serious implementation shortcomings identified in our case studies appear to have resulted from a remarkable loss in professional competence when a constituency's size falls below a minimum threshold mass. The necessary talent, breadth of knowledge, and capacity to adjust to the relevant managerial roles as required cannot be expected under such circumstances.
- (c) *Administrative deconcentration* in both personal services and technical tasks also evidenced unconvincing results concerning effectiveness. In the case of English schools, the reform objectives of promoting

homogenization of school quality and equalizing the performance of schools by means of uniform learning standards have not materialized. Differences among the schools appear still to be a product of the social backgrounds of the school children, rather than the actual capabilities of the schools. Therefore, there are hardly any signs of improvements in effectiveness that can be credited to the process of deconcentration in the educational sector. A similar diagnosis could be made in regard to the deconcentrated level of regional planning in England, which was seriously hampered by political and legal barriers as well as opposition at the local levels.

A direct comparison of the three approaches to decentralization reveals, at a first glance, that political decentralization appears to be the superior option concerning effectiveness. However, the results seem to be strongly shaped by policy and local characteristics, such as the time passed since implementation of the reform, the professional exigencies of the decentralized policy, the size of jurisdictions, and the local political constellations. Administrative decentralization and deconcentration yield negative results concerning effectiveness. Yet this finding also needs to be understood in conjunction with intervening variables (territorial size, external saving premises, and resistance of relevant actors).

### Efficiency

Decentralization programs are often pursued with high expectations regarding potential cost reductions, savings, and economies of scope. However, the empirical evidence is somewhat ambiguous. In the following, our aim is to concentrate on resource increases and the probability of cost reductions.

- (a) The *political decentralization* of the RMI in France was accompanied by enormous cost increases. The problem resulted from the fact that the national government, in addition to transferring the responsibility for the program's execution to the *Départements*, also passed along a whole series of other task-related risks. Moreover, the cost explosions resulted from the declared political will of most of the *Conseils Généraux*. In order to be able to meet the requirements, it became necessary for most of the *Départements* to invest in additional personnel and to take measures to readjust their internal management processes and technical capacities to ensure the successful accomplishment of their duties.

The decentralization of urban planning in France had similar effects. New instruments (SCoT, PLU) in the urban planning sector led to significant staff increases, particularly in the intermunicipal bodies (*établissements publics de coopération intercommunale* – EPCI) that are responsible for urban planning matters. These bodies were in need of new experts and specialists for the proofing and permission work. Compensation payments by the state were no longer sufficient to cover these additional costs. Overall, one can conclude that this area of political decentralization led to significant cost increases and that the expected savings have not been realized.

A similar situation is seen in the integration assistance program for the disabled in Germany. Also in this case, additional costs arose as a result of political decentralization. Short-term investments were required to create case management capacities and individualized care arrangements. However, these investments might lead to cost reductions in the future. However, due to the uneven distribution of qualified personnel among the local government agencies, the starting conditions for overcoming the decentralization-induced cost explosions vary from jurisdiction to jurisdiction.

The reform of local planning processes in England resembles the German and French experiences. Efforts to transfer such activities to the district level produced the inevitable need to increase the existing personnel pool considerably in the starting phase. It remains to be seen whether the promise of efficiency gains can be realized – though they are expected, especially from the reduced need for coordination in the daily routines underlying planning and building permit procedures.

- (b) In the course of the *administrative decentralization* of emissions control in Germany, the local councils accepted a 20 per cent decrease in the state's share of the costs. These savings were often secured through downsizing the professional teams. While large administrations were able to cope with such a downsizing of personnel, the smaller counties are confronted with structural problems. The interviews reveal some drastic capacity deficits that could result in long-term follow-up costs, which in turn would offset any savings associated with the decentralization process.
- (c) As far as *administrative deconcentration* is concerned, efficiency improvements remain controversial. Within English schools, most of the cost savings cannot be ascribed to functional changes but rather to the new flexible budgets, which are independent of deconcentration measures (see Levacic, 1994). In spite of this, higher

administrative costs and a deprofessionalization have resulted from the internalization of administrative functions (such as personnel management or the maintenance of buildings) into single schools.

The newly instituted regional planning entities in England have become leaner than the former county administration concerned with such plans, which at first glance indicates an increase in efficiency. However, a larger pool of personnel has become tied to the central government bureaucracy and the planning inspectorates in such a way that on the whole there is no empirical evidence for efficiency gains in this task domain.

In sum, it can be concluded that political decentralization has led to immediate and somewhat far-reaching cost increases in all cases – a burden that tends to overstretch the capacities of local government agencies. This is sharpened by the fact that the state subsidies have turned out to be inadequate. While savings expectations seem to be possible in the long term, in the interim a widening gap has emerged between necessary expenditures and available resources. Such unfavorable circumstances tend to put economically disadvantaged and poorly performing local governments under pressure.

### **Horizontal coordination**

It is expected that decentralization measures will produce a highly integrated and synchronized system of coordination that covers the entire territorial area and transcends a single-policy orientation. We continue our analysis in the following by concentrating on this aspect of intersectoral coordination.

- (a) For *political decentralization* in France, some evidence of improvements in horizontal coordination can be seen. The *Départements* were able to overcome the multidimensional challenges that came along with the newly delegated tasks. They were also relieved by the fact that their actions were no longer constrained by “partnerships” with state agents. Multilevel entanglement has been reduced considerably. The French “multilevel state,” to pick up the concept of the introductory chapter, operates now in a far more disjointed manner. Consequently, frictional losses were reduced and local-level coordination mechanisms were strengthened. Hence, the intersectoral horizontal coordination capacities of the General Councils improved remarkably. Within the area of planning, French local governments profited from well-established and functioning

relationships among local planning offices, construction administrations, and operators in other connected fields. After the new planning legislation came into effect in 2000, this collaborative synergy across the professions deepened and intensified.

Some positive impacts can also be seen arising from the political decentralization of the integration assistance program in Germany. For the first time, it became possible to bundle most social services such as social welfare, health, and youth services at the local level. The decentralization project laid the foundation for the establishment of case management systems and strengthened the collaboration with local service providers. On the other side, the need to reconcile the viewpoints and standard practices of the different counties requires intensive interlocal negotiations, which lead to friction losses.

The political decentralization of planning functions to the district level in England can also be positively assessed. Intersector coordination among the various professions has improved considerably, especially in the field of development control. Speculative predictions of a likely deterioration in consultation practices among the counties turned out to be unfounded. Moreover, the creation of a single statutory agency to oversee all planning functions has positively impacted the coordination patterns among the local governments.

- (b) Regarding the activities of the *administratively decentralized* local-level Emission Control Authority in Germany, specialists in the field emphasized potentials for improving cross-policy consultations between neighboring departments. Yet contrasting opinions pointed to the fact that the level at which tasks are fulfilled does not matter for performance. Furthermore, there are often internal conflicts, which tend to hamper horizontal coordination within the county administration. Therefore, our evaluation yields a quite ambiguous empirical picture, which supports the explanatory power of actor-related factors.
- (c) As expected, *administrative deconcentration*, which typically applies to the English cases, leads to clear losses in horizontal coordination. Instead of cooperating with one another, it has now become the rule for schools to compete for personnel and the use of public goods, reminiscent of the US adversarial system government. We heard regular reports of poor coordination activities among schools and local authorities affecting access to such key services as youth welfare, crime prevention, planning, recreation, and sporting activity services.



Also regarding regional planning in England, we find the typical situation of a single-purpose administration with corresponding deficiencies in coordination. Planning processes are decoupled from other policy domains, simply because monofunctional planning authorities tend to concentrate solely on the responsibilities associated with their own planning mandate. The management of other equally important regional planning functions, such as in the areas of economic and structural development, was assigned to other agencies at the time of our research. This tends to bring about a certain degree of institutional rivalry.

To summarize, our findings indicate that political decentralization measures have produced improvements in the form of horizontal, cross-sectoral coordination. In contrast, the assessment of administrative decentralization measures on performance is less clear-cut, while the assessment of deconcentration processes seen in England is clearly negative. From the perspective of the multilevel state, capacities to coordination depend on type of relationship between levels.

### Vertical coordination

Vertical coordination describes the capacity of institutional actors to find solutions to problems across multiple administrative levels. Typically, decentralization measures have been assumed to impact this performance dimension negatively. What conclusions can be drawn from our empirical findings with regard to this performance dimension?

- (a) In the case of RMI as well as that of urban planning, *political decentralization* measures in France have contributed to a weakening of vertical coordination between the local government entities and the state. In the case of the RMI, this has proven to be detrimental, because the subnational levels still lack any kind of hierarchy. Informal methods of cooperation between the territorial levels could not compensate for this deficiency, which has led, in turn, to friction losses and partially limited the capacity for action in the subnational space. However, in urban planning, a quite different situation has arisen. Well-developed informal coordination mechanisms across levels of government have continued to operate and support sector-specific cooperation as they did before.

In the aftermath of the political decentralization of the integration assistance program in Germany, vertical coordination activities

have been reduced almost exclusively to relationships between the different local government levels. Consultations occur regularly between local government units and the Association of Local Authorities for Youth and Social Welfare (KVJS) – a single-purpose cooperative body of local authorities. After the decentralization, the KVJS found itself deprived of much of its original power and it now operates primarily as a service unit. Thus, vertical coordination mechanisms in this case have been reduced to a remarkable extent.

Looking at planning at the local level in England reveals that the district councils are still subject to vertical interventions, in spite of their increased autonomy and the diminishing discretionary power of the state. The launching of the urban planning measures was closely supervised by the Government Offices<sup>4</sup> and is monitored by state planning inspectors. This coordination has proven particularly problematic whenever political differences over planning decisions have surfaced.

- (b) *Administrative decentralization* measures have led to a reduction in state–local coordination practices vis-à-vis the emissions control authority in Germany. The regional governments (*Regierungspräsidien*) are not in a position to offer their own capacities to meet the professional needs of the local governments. They have relinquished their active role as a supervisory agent. This has proven to be functionally unsatisfactory for the support needs of the local governments.
- (c) As would be expected, *administrative deconcentration* measures in England increased coordination efforts among actors within different administrative levels. Consequently, the scope of institutional linkages between state representatives and individual schools, as well as local authorities, has since become much greater. Forms of arbitrary interferences by the national government have increased, as can be seen in the rigid system of inspections, performance management standards, rankings, and benchmark tests. Furthermore, regional planning activities have increasingly been subject to interventionist controls from national government agencies.

A summary of our empirical observations reveals that decentralization strategies have predominantly resulted in the weakening of vertical coordination. This posed no problems as long as informal communications between skilled professionals continued. Nonetheless, the process

was still accompanied by some problems, such as in those cases where formal legislative directives were unclear or when supervisory and support functions were no longer sufficiently provided by the state government level.

### **Democratic control and accountability**

Input legitimacy results from a precise political mandate, transparency of decision making, and democratic participation in the formulation and execution of policies. To what extent has this changed due to the decentralization policies?

- (a) The *political decentralization* of the RMI and of urban planning in France led to a strong local-level politicization. Local actors had major political stakes in these fields and were strongly interested in guaranteeing an effective and efficient task fulfillment to their voters. On the other hand, citizen or interest group involvement turned out to be minimal. The task transfers served to strengthen the power of local executives, who are well known for their tendency to marginalize the elected council.

Also in the case of Germany, the formal authority of the local political organs over the integration assistance program met a limited degree of actual democratic support. The freedom to act is limited to implementing case management, differentiating care facilities, or tightening the fiscal framework. This tends to lower the salience for local politicians. Although people with disabilities now have greater opportunities for voice, they are constrained by the fact that the decision-making processes have become less transparent. In most constituencies, professional charities tend to monopolize the existing representative mechanisms for their own ends. Thus, there has been no significant improvement concerning democratic accountability.

In England, the political decentralization of the LDF has reinforced democratic accountability, since the councils gained more room for maneuver. This pertains to the discretionary power of individual councils to pursue their own planning needs and to coordinate their actions with those of neighboring regions.

- (b) *Administrative decentralization* does not imply a transfer of political decision-making powers. Yet an analysis of the local Emission Control Authorities in Germany reveals that local political interests

nevertheless exercise considerable influence on decision making. There is a permanent struggle between legal regulations and the local actors' interests. Considering that there is no legally prescribed formal decision-making power granted to the local council in this task domain, political accountability and transparency of competencies have become blurred.

- (c) A similar assessment can be made regarding the effects of *administrative deconcentration* in England. Accountability is blurred by the creation of advisory boards to support the autonomy granted to schools. There is an obvious weakening of the elected councils. A comparable waning in democratic control and accountability can also be seen at the regional planning level in England. The regional administration model consisting of regional planning bodies, regional assemblies, and national Government Offices revealed a serious failure to realize the expectations of transparency.

Summing up, it is evident that *political decentralization* measures strengthen formal democratic control and accountability. However, the actual degree of democratization tends to be limited. Some of the politically decentralized tasks leave very little room for discretionary decision making. On the other hand, policy implementation depends to a great extent on the policy preferences of local actors. This has contributed to the diminishment of the power of elected councils. In many cases, executive actors or individuals with corporate interests have tended to become the ones who profit most. In the case of *administrative decentralization*, the transparency of decision making has declined. Hence, local task fulfillment has become politicized – the lack of formal political powers notwithstanding. Thus, there is a risk of policymaking at the local level becoming a privilege of the few. Finally, *administrative deconcentration* strategies may offer more opportunities for participation by different stakeholders (concerned citizens, interest groups, and so on). Other relevant aspects of input legitimacy, such as the political accountability of the elected councils, often tend to fall far short of expectations.

### **Equity of service provision**

Decentralization strategies are often seen as a reason for growing disparities among local governments and regions. A common normative counterclaim is the need for the equal treatment of citizens. The

question here is: to what extent can decentralization and equity be made compatible?

- (a) The *political decentralization* of the RMI integration policy in France has further widened preexisting regional disparities in social standards. *Départements* struggling with tight budgetary situations are not able to configure their policies in a proper way. This contrasts to some extent with the case of urban planning, where performance differences did not increase. Variation in planning instruments and the density of planning activities is due to the demographic and structural differences between localities.

In Germany, variance among local governments has intensified over time. In the case of the *political decentralization* of integration assistance for disabled people, this is due to differences in the fiscal conditions and diverging management philosophies. Whereas the majority of the county governments attempt, in general, to strike a balance between an acceptable level of service and cost savings, others confine themselves exclusively to short-term measures.

- (b) This finding applies even more to the *administrative decentralization* of the Emissions Control Authorities in Germany, which have heightened the variance of task performance. Unequal political support, varying resources, access to advanced training possibilities, and distribution of informal networks are seen as responsible for the further diverging performance levels.
- (c) Whereas this diagnosis is thus far consistent with our initial assumptions, intensified performance variations in the context of *administrative deconcentration* are counter to our hypothesis. However, performance heterogeneity has increased among individual schools as well as among municipalities. Although there is an overall slight trend toward improved performance resulting from stronger competitive incentives, the deconcentration has nevertheless intensified preexisting differences between schools. There was also considerable variance in regional planning activities in England. Huge dissimilarities in implementation quality and density throughout the country existed. These are reinforced by political resistance against the planning objectives imposed by the central government, particularly in the conservative South.

Regardless of national and policy-specific features, all three reform models have resulted in the intensification of performance differences among local government authorities. The principal causes of this

development could be traced to unfunded mandates and insufficient fiscal resources of local governments as well as a lack of political will to achieve alignment in local service delivery.

Summary and conclusion

The concept of the multilevel state sketched by Bohne *et al.* in the introduction to this volume is a fundamental characteristic of the modern state. Our research shows that multileveledness can show different facets with different consequences for the quality of governance. Our findings can be summarized as given in Table 13.2 regarding how the different decentralization types and task areas are related to the six performance dimensions.

In general, our empirical findings show the institutional changes that exert a significant influence on task fulfillment and the performance of

Table 13.2 Empirical findings on performance impacts<sup>a</sup>

Performance dimension	Political decentralization			Administrative decentralization		Administrative deconcentration	
	France		Germany	England	Germany	England	
	Technical planning task	Person-related task	Person-related task	Technical planning task <sup>b</sup>	Technical planning task	Technical planning task <sup>b</sup>	Person-related task
Effectiveness	+	0	+/-	+	-	-	-
Efficiency	-	-	-	-	+	+/-	+/-
Horizontal coordination	+	+	+	+	+/-	-	-
Vertical coordination	-	-	-	0	-	+	+
Democratic control	0	0		+	-	-	-
Equity	-	-	-	-	-	-	-

<sup>a</sup>Aggregated case study findings (F1 = South and North Département; F2 = South and North City; D1 = South and North County and North City; D2 = South and North County, South and North City; E1 = North and South City, North and South County, Regional Planning Area South-West and North-West; E2 = North and South County).

<sup>b</sup>“Technical planning task” is displayed twice for England in the table to reflect the partial inclusion of individual cases in either the area of political decentralization (local development frameworks), on the one hand, or administrative deconcentration (Regional Spatial Strategies), on the other.

“+” means “increase”; “-” means “decrease”; “0” means “no change”; “+/-” means “partial increase, partial decrease” (variance by cases).

service delivery. Any type of task transfer to lower levels of government – be it political/administrative decentralization or deconcentration – exacerbates existing performance disparities or creates new ones. Furthermore, there is a positive causal relation between political decentralization and the horizontal coordination capacities. This seems to prove our initial hypothesis that the integration of tasks within multifunctional institutions may help to improve territorial coordination within a given administrative jurisdiction. Our study also demonstrates that the effectiveness of task fulfillment tends to be positively influenced by political decentralization, while the opposite may be said with regard to deconcentration. This finding stands in contrast to our theoretical expectations as outlined at the beginning of the chapter.

However, the euphoric expectations placed on decentralization strategies cannot be justified. Decentralization often entails considerable additional costs and burdens that sometimes overload local governments. In none of the cases examined here have national/state governments shown much inclination to sufficiently address the budgetary problems of local governments by reimbursing costs. Such circumstances frequently carry the risk of leading them to default on their performance obligations and of creating implementation failures or inconsistencies of law application. Against this background, it comes as no surprise that decentralization of mandatory state tasks leads to reductions in voluntary local self-government tasks.

We need to emphasize, however, that the actual causal relationship between decentralization and performance is largely shaped by other intervening factors. On the one hand, our findings reveal that the effects of decentralization are closely linked to the nature of the transferred tasks. Wherever horizontal coordination is a significant aspect of service provision and economies of scale feature less importantly, decentralization leads to performance improvements. On the other hand, there is a clear influence of local policy preferences and political interests in conjunction with the salience of tasks. Improvements in effectiveness tend to occur if the fiscal situation of a local authority allows enough room for maneuver. This finding is consistent with the conclusions of other comparative studies, which suggest that the execution of a decentralized task works best if it is coupled with strong fiscal autonomy (for an example from Sweden, see Wollmann, 2008). This illustrates the fact that it is not only a question of *too much* decentralization but also one of *not enough* fiscal autonomy, which may ultimately lead to the overburdening of local governments in Continental Europe and the United Kingdom.

## Notes

1. This chapter is based on the results of a project funded by the DFG entitled “Wandel westeuropäischer Lokalsysteme,” headed by Jörg Bogumil and Sabine Kuhlmann, and assisted by Falk Ebinger, Stephan Grohs, and Renate Reiter. For further results, see Kuhlmann *et al.* (2011) and Ebinger *et al.* (2011).
2. In a related article, we deal only with England, since after devolution some partly differing developments could be observed in Scotland, Wales, and Northern Ireland.
3. Owing to space limitations, not all evidence for our qualifications can be made explicit in this chapter. A more detailed analysis of the case studies including supporting materials can be found in Kuhlmann *et al.* (2011).
4. The Government Offices, along with the entire system of regional spatial planning, were abolished after the change of government in 2010.



# 14

## Endogenous Transformations in European Public Administration: Soft-Law, Transnationally Networked Governance as a Self-Reinforcing Trend

*Joseph Corkin and Nina Boeger*

### Introduction

Where journals were once full of articles analyzing the process of European integration, they are now full of articles analyzing the EU as a system of governance. This chapter combines these themes, arguing that to understand the process by which the EU is now integrating it has become necessary to understand the EU as a system of governance. More particularly, it asks whether intergovernmental and neofunctionalist traditions, each of which attributes institutional (trans)formations in the EU to the preferences of particular political principals, end up neglecting the impact that their chosen institutional agents – communities of expertise – have on their own (trans)formation. In an institutionalist bent, this chapter asks whether these communities of expertise, successful as they are at embedding themselves in the EU's existing institutional architecture, also bring their own internal practices to bear upon it.

A hugely significant trend in European integration – often dubbed “new” or “experimentalist” governance – has seen the EU turn increasingly to coordination via transnational networks and softer forms of disciplining (peer review, monitoring and evaluation, the exchange of best practices, benchmarking, and so on) rather than the hard law and centralized institutions of the traditional Community Method. Domestic delegation of policymaking to arm's length organizations populated by communities of expertise – whose cooperation on discrete technical tasks easily extends across national boundaries – proved a

precondition to (and made more feasible) the emergence of transnational policy networks, as did the fact that, in the EU's multilevel system of governance, relations between national, European, and international decision makers have become increasingly entangled: transnational policy networks are a manifestation of the *multilevel state* or multilevel governance in Europe.

Orthodox accounts of how these modes of governance in the EU (trans)form – based on “common sense” assumptions about their proliferation – tend to draw on a liberal intergovernmental framework that attributes institutional (trans)formations in the EU to ‘conscious calculations by Member States’ (Moravcsik, 1993, p. 473), sometimes with a neofunctionalist gloss that allows for a degree of entrepreneurialism from Brussels. Moving beyond these predominant theoretical frames, this chapter instead hypothesizes an endogenous explanation of EU institutional (trans)formations that is complementary to orthodox (exogenous) accounts, whereby they are driven from within by the communities of expertise that populate existing institutions.

### **Transnational communities of expertise in the modern state**

States today do not so much run things as regulate them or monitor regulation occurring in arm's length organizations (which frequently become more important than states among those officials who frame debates over regulatory design) (Jordana *et al.*, 2011). This is especially so, but not exclusively, in policy domains ‘removed from the political whirl’ where governments themselves have fewer or weaker preconceived views and beliefs (Haas, 1992, pp. 5–7, 29). In doing so, they place increasing reliance on organized cooperation between working-level professionals recognized for their expertise and competence in a particular field who, despite their often diverse disciplinary backgrounds (scientists, economists, lawyers, and so on), form or are corralled into an epistemic community with ‘authoritative claim to policy-relevant knowledge in that domain or issue-area’ (Haas, 1992, pp. 3, 18–20).

The influence of communities of expertise is familiar in a policymaking context, where their capacity to shape the preferences of political principals has long been apparent (Adler and Haas, 1992, p. 381; Carpenter, 2001, pp. 30–1). In defining the salient problems in a field and offering a limited menu of solutions, communities of expertise are well placed to determine the parameters within which those with formal policymaking power decide: structuring, organizing, and closing down their debates, diffusing controversy, and narrowing or stabilizing the interpretative

space for their negotiations (Haas, 1992, pp. 2–4). They can also help formal decision makers to identify their interests either directly or by identifying, naming, and framing the dimensions of a policy problem, from which they might then deduce those interests. Whenever they therefore enjoy special access to those with formal policymaking power, they can act as brokers who admit new ideas into their privileged circles. They can set the policymaking agenda by constructing cognitive frames and articulating cause-and-effect relations and, as long as these resonate more broadly, may rapidly ‘cascade’ them to become the received way of understanding a policy problem; so widely accepted, they achieve a taken-for-granted quality (Haas, 1992, p. 17).

From an institutional perspective, these domestic delegations of policymaking challenge traditional intergovernmental understandings of interstate cooperation that treat states as unitary actors and cooperation as driven to create common institutions to secure superior net benefits (for example, transaction cost savings). Instead, as states ‘disaggregate’ into functionally distinct substate units to cope with various capacity deficits at the domestic level, these units start to cooperate directly with functionally equivalent units in other states, thus bringing about their own transnational order (Slaughter, 1997, p. 184, 2004; Keohane, 1997, p. 488; Kahler, 2001, p. 278). Their cooperation easily extends across national boundaries precisely because it is nurtured by a common policy enterprise that frequently means political or national affiliation drift into the background. Members of the community of expertise, especially once they are formally incorporated into a transnational policy network, may then prefer to follow the ‘logic of hierarchy’ and orientate themselves to the concerns, considerations, and steering signals of their political principals or, more likely, follow the ‘logic of portfolio’ and continue to owe primary allegiance to their community of expertise (Trondal, 2010).

The (re)socialization that ensues can be profound. Regular cross-border interactions among national-level professionals in this institutional context – as their cooperation on discrete technical tasks begins to generate mutual empathy and trust as well as some predictability and stability in their interaction – subtly change their identities: the more sustained and intense those interactions are, the greater the potential for resocialization into the transnational processes and network(s) (Beyers, 2010). The communities of expertise inside these networks become, potentially ever more, ‘moulded [sic] by norms and common understandings’ (Kratochwil, 2000, p. 53; also Kratochwil, 1989, p. 198), internalized via processes of persuasion and social learning that come to

define, frame, and channel their (transnational as opposed to domestically defined) interests and identities (Finnemore and Sikkink, 2001; Reus-Smit, 2004). These conditions equip them to build strong cross-border coalitions, enabling them to form what international relations literature has described as a 'transgovernmental elite' linked by 'ties of common interest, professional orientation, and personal friendship' that may trump their allegiances to their national political principals (Keohane and Nye, 1974, pp. 45–6).

### **Trend toward soft-law, transnationally networked governance**

The transnational order populated by these elites has seen them become increasingly institutionalized and formalized into structured processes and networks bringing together, in regular intervals, national experts to share experiences, to monitor and evaluate one another's policies, and to build consensus on best practice, but without the aim of imposing anything as hard as international or supranational law (Keohane and Nye, 1974; Braithwaite and Drahos, 2000; Eriksen and Fossum, 2004; Stone, 2004). Subject to variable degrees of formalization, these networks and processes are shaping up into a transnational mode of governance in their own right. The EU is at the forefront of this trend as it has turned to so-called "new" or "experimentalist" modes of governance in fields as diverse as the regulation of the networked industries, environmental protection, medicines, transport safety, pensions, migration, organized crime, financial markets, and drug control (De Búrca and Scott, 2006; Scott, 2009; Armstrong, 2010; De Schutter and Lenoble, 2010; Sabel and Zeitlin, 2010; Dawson, 2011).

The relevant networks at the heart of these modes of governance (forums, working parties, conferences, systems, committees, joint authorities, groups, councils, platforms, 'agencified' networks, 'networked' agencies, 'open methods of coordination', and so on) (Levi-Faur, 2010, pp. 10–1) are characterized typically by the fact that while participation in them is voluntary, they do facilitate a set of relatively stable, transnational and nonhierarchical relationships between subunits of the Member States (Risse-Kappen, 1995, p. 38; Eberlein and Newman, 2008, p. 32). Multilevel as well as participatory elements of state and statehood are embedded, as ideal models, in their institutional, functional, and normative design: they are set up to bring national, European, and (in some cases) international policymakers together in this way (*multilevel state* or multilevel governance), *and* to maintain a degree of

accountability, transparency, and stakeholder participation in policy-relevant decision making (participatory state, although the extent to which they manage to live up to their participatory ideals is, of course, a highly contested and extensively debated issue; for a sample of the literature, see Dawson, 2011).

These networks generate governance by comparison, in which interactions tend to be consensual, heterarchical, flexible, and informal: coordinating and disciplining their members more softly than do traditional international or supranational law and organizations, relying on peer review, monitoring, and evaluation. Sovereignty remains vested in national arenas, but is then overlaid by interaction between national experts facilitated by the network (Bulmer and Padgett, 2004, p. 110) through soft-law processes (Snyder, 1994, p. 198). These include the setting of indicators for best-practice learning; setting common goals, targets, timetables, guidelines, and frameworks for action; joint efforts to mobilize internal and external resources; transparency rules for enhancing trust; rules and arrangements for monitoring; and benchmarking and voluntary coordination through the exchange of best practice.

While lower-level units are given the autonomy to advance or implement EU-formulated frameworks as they see fit (adapted to their own circumstances and depending on how much room the framework leaves), they agree to report regularly on their performance against agreed indicators that include specific goals and measures for gauging the achievement of those goals. In doing so, they rely on more consensual, flexible and informal, less-binding decisional rules and procedures with nonlegal sanctions (for example, reputational damage through naming and shaming) and a degree of negotiability in compliance, instead of command-and-control methods involving centralized public institutions, hierarchical relationships, electoral responsibility, hard law, and binding decisions (Hollis, 2010, pp. 317–8).

## **How the trend (trans)forms**

Studies of “new” modes of governance in the EU tend to be directed (understandably, given the fast pace of their evolution) toward discovering them in ever more places (Sabel and Zeitlin, 2010), as well as offering rich normative debates about their legitimacy (Sabel and Zeitlin, 2008; Joerges, 2008) and conceptual ones about quite how, as modes of integration, they differ from, relate to, and interact with the Community Method (Walker and De Búrca, 2007). For some, the Community Method represents a threshold that the Member States first

try to avoid, but also a long-term line of convergence toward which institutional (trans)formations in the EU tend (Diedrichs *et al.*, 2011, p. 35). New modes of governance are, on this basis, no more than a transitional step toward more advanced forms of integration, a temporary deviation, whose softer disciplining will eventually be upgraded or hardened. For others, they represent a profound change in the trajectory of European integration and the EU's institutional development.

Our concern in this chapter lies with a related question, namely, how we might explain the institutionalization (emergence and evolution) of this trend: what processes, circumstances, and influences account for the (trans)formation of governance in the EU along a soft-law and transnationally networked trajectory? The trend is usually attributed to complexity and to the interdependencies of globalization that create functional pressures for coordinating governance across national borders, but which then run up against the sovereignty reflex of nation states reluctant to cede control to supranational law and institutions. According to this account, governments recognize the need to coordinate with one another in particular fields, but will tolerate only the soft disciplining of transnational networks. From this perspective, "new" modes of governance are the Member States' answer to resolving the 'perennial tension' between their 'problem-solving impulse to use the EU level efficiently, effectively and legitimately for national objectives' and their 'sovereignty reflex' to resist transferring power to it (Diedrichs *et al.*, 2011, p. 22). A contributory factor in the EU may be the federalist impulse of its existing institutions, which are content, in the face of these national sensitivities, to 'upload' particular fields to the European level using such transnational networks in the hope that governments will eventually acquiesce to more supranational solutions (Gilardi, 2005, p. 85). Thus, neofunctionalist accounts tend to emphasize the autonomy of the EU Commission to exploit functional spillovers and gaps in Member State control (qualified majority voting and a culture against the frequent resort to the veto), in order to influence EU integration and its institutional (trans)formations (Wallace, 2005, p. 85; Martens, 2008). Acting entrepreneurially, the Commission encourages the establishment of institutions that sponsor further integration and to which interest groups will turn their allegiance, and exploits transnational networks of such groups to promote its own policy preferences within domestic arenas (Schmitter, 1970; Sandholz and Stone Sweet, 1998; De la Porte, 2011). It encourages softer forms of coordination to build the case for direct powers in fields adjacent to core EU competences or as a 'back road to the informal harmonization of regulatory

practices' (Scott and Trubek, 2002, p. 7), or simply a convenient means for it to fill its own capacity gaps (in terms of knowledge and resources) (Eberlein and Newman, 2008, pp. 35, 45).

Other accounts of institutional change have moved beyond these theoretical frames and their shared assumption(s). So, it has been observed that the intergovernmental approach may be particularly suited to explaining 'major turning points' in European integration and the EU's 'history-making' institutional (trans)formations (Moravcsik, 1998, p. 1), but less so for accounting for incremental change in the intervening periods. While the intergovernmentalist might assume that the 'consolidation period' simply plays out the implications of these grand bargains, Pierson, for example, notes how high issue density makes unanticipated consequences common and limits the capacity of Member States to 'capture the slack' (Pierson, 1994, pp. 13, 37). In these circumstances, an institutionalist approach is better suited to explaining more subtle institutional (trans)formations (Peterson, 1995; Aspinwall and Schneider, 2000; Héritier, 2007, p. 1). Some historians are also nuanced enough to account for these, showing enough attention to detail to move us beyond a framework that might in any way reduce integration to a tug-of-war between sovereignty-driven Member States and an entrepreneurial EU. So, in a series of articles focusing on the origins of the EU (then the EEC), Schot emphasizes the significance of 'technocratic internationalism' (Schot and Lagendijk, 2008; Schot and Schipper, 2011, pp. 287–8; see also Fouilleux *et al.*, 2005) – a distinctive set of beliefs among experts as to how states ought to collaborate – which, we would argue, has reemerged as a significant factor in explaining contemporary modes of European integration. In particular, experts tend to understand the EU not as an end in itself, but as a pragmatic attempt to solve concrete policy problems in which national and European solutions might coexist quite happily provided those experts are involved at both levels to synchronize their impacts on one another. In other words, optimality is best served by transnational expert deliberation, not intergovernmental negotiation, which they consider degenerates too quickly into bargaining and petty nationalism, or indeed supranational imposition.

Building on this tradition (see also Marks *et al.*, 1996; Pierson, 1998; Stone Sweet *et al.*, 2001; Coen and Thatcher, 2008a, p. 806), the hypothesis put forward in this chapter is that in order to understand the institutionalization (emergence and evolution) of the trend toward soft-law, transnationally networked governance in Europe, we need to move clearly beyond the implicit assumptions of intergovernmental and

neofunctionalist reasoning – namely, that the transnational networks and processes at the heart of “new” modes of governance are designed exogenously, from the “outside in” (through negotiation and agreement among national governments, perhaps influenced by a degree of entrepreneurialism from existing supranational organizations). Instead, we interrogate to what extent the relevant networks and processes populating this “new” governance trend might also owe much of their institutional (trans)formation to *endogenous* change. Our question is: are these governance processes designed only from the outside in (as suggested by the exogenous accounts) or do they in fact (also) (trans)form to a significant extent from the inside out, driven by the very communities of expertise that are part and parcel of governing in this way? Do these communities use their ability to frame complexity, their informational advantages, and so on, to seek their own formalization as institutions of European governance? Does their well-documented influence over policymaking in fact extend to the institutional design of the processes and governance structures through which they exert that influence? Do they draw on their own internal governance practices – attributing to them a universal validity that transcends the governance of their community – to seek to remake the architecture of European integration in their own image? In such a case, they will end up resisting traditional supranational law and institutions and instead ramp up certain characteristics in transnational rulemaking that we associate with their own practices as epistemic communities, including commitments to experimentation, peer review, mutual learning, and consensus building; to the collegiate sharing of best practice instead of competition and negotiation; to the heterarchy of networks instead of the hierarchy of central authority; to the organization around common epistemic perspectives instead of national affiliations; and to technocratic, transnational settings instead of parochial politics. This in turn suggests that the trend toward “new” modes of governance is path-dependent, its symbiotic relationship with its communities of expertise making the two self-reinforcing.

This hypothesis *complements* (rather than replaces) exogenous accounts by suggesting that the communities of expertise that are part and parcel of these governance modes have become, in their own right, prominent drivers of the pace and especially the form in which European integration is now happening. They may lobby to have their internal practices reproduced in the EU system of governance, thereby remaking the EU in their own image. These endogenous processes give “new” modes of governance an integration dynamic with considerable autonomous



momentum, not in the sense of the usual spillover effects that neofunctionalists use to explain how EU institutions accumulate power, but in that these governance modes – favored by the Member States precisely *because* they supposedly avoid supranational accumulations of power while permitting transnational coordination – empower particular communities of expertise that then might seek more of the same. We operationalize this hypothesis below in two steps. First, we interrogate how these communities might get involved and position themselves so as to bring their endogenous influence (and be it through forms of “soft” power) to bear on institutional (trans)formations. Second, we consider what might drive them to seek to influence the institutional trajectory of “new” governance in a way that might render it self-reinforcing, replicating their own internal processes in governance form.

### **From policymaking to institution making: bringing their soft power to bear**

In light of the summary given earlier of how communities of expertise have been shown to exert influence over policymaking, it should quickly become apparent how this might transpose also to the institution-making context; how, in other words, the role of communities of expertise and their transnational networks is similar when it comes to institution making. European integration is not all about ‘hardball bargaining among fixed preferences’ (Pollack, 2003, p. 59). Knowledge and the control of ideas also represent an important source of power. Communities of expertise can, on occasions, use their soft power to influence decisively the formation of preferences among those formally empowered to effect institutional (trans)formations in the EU. On occasions, they might even exercise it in such a way as to provoke conflict with notions of participatory or transparent governance (the *participatory state* or the *transparent state*) that they themselves have promulgated flying the flag of “new” governance (Smismans, 2008). They are better able to generate reasons to expand their power than their political principals are at wresting it back. Their insider knowledge and specialist expertise emancipates them from, and allows them to outmaneuver, their more generalist political masters.

In some policy fields, domestic delegations to relevant communities of expertise proved to be a precondition of (and made more feasible) transnational networks in the EU: in part because it was easier to corral existing domestic institutions into such networks than to try to establish new supranational institutions from scratch, but also because these

domestic institutions had already taken it upon themselves to interact more with their counterparts in other states, thereby ensuring that the institutional foundations of such networks were already in place. By way of an example, as the Member States privatized state monopolies in ever more sectors, replacing direct command-and-control intervention with arm's length regulation by national regulatory authorities (NRAs) that were to enforce and manage competition in these newly liberalized markets, they created a new set of actors capable of shaping future interstate cooperation. And this goes some way to explaining why the agency model that they were happy with at the national level was not simply replicated at the European level when these newly liberalized national markets gradually became more European.

At the same time, this account – of how domestic delegations helped in generating transnational networks – tells only half the story: omitting the independent role of the communities of expertise at the heart of these delegations (here, a transnational network of NRAs) in bringing about endogenous institutional change. Just as in the policymaking context, a community of expertise that populates an institution that it cannot change formally must act entrepreneurially to mobilize its soft power so as to persuade a critical mass of those that *are* so empowered to follow its understanding of how that institution ought to be transformed. Central is the decisive influence they may wield over preference formation among the veto players in institutional (trans)formations. It may seize therefore on moments of institutional fluidity to steer change in directions that enhance its role or that protect its role from the encroachment of the Commission and/or an EU agency (Coen and Thatcher, 2008b, pp. 54–60; Eberlein, 2010, p. 61). Less formalized (but nonetheless transnational) networks, some of which may preexist their formal induction into the process, may lobby to be taken into that institutional fold. Once admitted, they are powerfully positioned to rely on their insider status to influence institutional change, not least because the network operates in a transnational space over which governments have less control, in particular because they share that control with one another and are frequently less well placed than is the network to form the necessary coalitions to wield a blocking veto.

Institutional (trans)formations in the EU require the support of the Commission, (at least) a qualified majority of the Member States, and a majority of the European Parliament, each of which comes to the negotiating table with distinct preferences, anxious, above all, to exert at least some control over the institutional architecture that emerges out of their negotiations. That anxiety is less about 'agency drift' than a

fear of 'political drift' in which one of their institutional rivals captures the common agent created (Dehousse, 2008, p. 796). The popularity of new modes of governance might then be due to the scope this inter-institutional jockeying creates for the communities of expertise that operationalize those modes of governance to exploit the gap between the political principals to play them off against one another. Unable to agree on how to sanction their common agent for shirking, the political principals are caught in a 'joint-decision trap' (Scharpf, 1988) and end up neutralizing one another in a manner that perpetuates a mode of governance based on transnational networks and softer disciplining that suits, above all, the communities of expertise that are required to put it into practice. Again taking the example of NRAs, if we locate an agency solely in those with the formal power to (trans)form institutions in the EU, we overlook the autonomous power base that communities of expertise have quietly accumulated at the national level and then extended transnationally in the links that they have forged with their counterparts in other Member States. Egeberg and Trondal suggest the partnership that the Commission establishes with NRAs that have been brought together in transnational networks decouples them from their national political principals, thus drawing them into a multilevel EU executive (Egeberg and Trondal, 2009, p. 686), but it might also enable them to escape the control of both. While a transnational network certainly gives NRAs new resources to escape the control of their parent ministry (Coen and Thatcher, 2008a, p. 828), the networked architecture and softer disciplining also means that they can avoid becoming absorbed into the EU's supranational structures and the new set of political principals this would entail. They thereby carve out a transnational space for themselves between national and supranational levels in which they are subject to fewer hierarchical checks, wherever these might come from.

## **Making Europe in their image**

If, as hypothesized, communities of expertise are capable of significantly influencing institutional (trans)formations in the EU, they are also likely to ramp up certain characteristics that we associate with their internal practices. So, when a community of expertise is institutionalized – drawn into and formalized as a transnational network – it may well work toward embedding its internal governance practices in that network and resisting anything that departs from those practices. It is likely to seek to replicate its internal practices in the institutions it

populates and thus ramp up characteristics in them that we associate with its way of doing things:

- a preference for local experimentation (subsidiarity) over centralization;
- a preference for accountability via softer forms of disciplining and steering (peer review, pressure, and persuasion) over hierarchical imposition;
- flexible and informal procedures that are subject to continual, incremental evolution;
- consensus building through openness and collegiality (sharing results and best practice, and so on);
- organization around a shared policy enterprise, causal beliefs, notions of validity, and normative commitments, rather than national affiliations;
- a preference for transnational, technocratic settings over parochial, political settings; and
- a preference for deliberation over negotiation.

This second part of the hypothesis has important implications. In particular, it suggests that “new” modes of governance will be subject to a degree of path dependency because they are locked in a symbiotic relationship with the communities of expertise that are required to put them into practice, each reinforcing the other. The more a community of expertise dominates an institution, the more its rules, rituals, beliefs, and professional biases permeate that institution to shape how it constructs its environment, the interpretative frames it uses to generate meaning, and the ends and means it values (generally, see Berger and Luckmann, 1966; more specifically, see Haas, 1989; Immergut, 1998, pp. 14–5). As such, rational choice approaches might go some way in explaining the path dependency (why, or the directions in which, communities of expertise might seek to influence institutional [trans]formations), but they will also leave important questions unanswered. Rational choice analysis attributes an agent’s deviation from the goals of its principal to an attempt to maximize its own utility (Tullock, 1965) – the classic bureaucratic pathology of “mission creep” – whereas sociological institutionalist approaches admit normative and ideational explanations. These latter explanations would accept that the preparedness of various actors (those with formal decision-making powers, their advisers, and so on) to bring their softer forms of coordination to bear on European integration depends on the degree to which they are motivated not only by rational choice but also by a sociological/ideational

commitment to them. As regards rational choice, relevant actors will promote and comply with a particular idea because it gets them to where they want to be, an instrumental means to an end, namely, the maximization of their utility. But sometimes norms and ideas – and the values, roles, and rules that they embody – count for more than this and the actors have pursued them because they think it ‘appropriate’ to do so (March and Olsen, 1998). What if actors construct, promote, and comply with institutions not only because they serve their interests but also because they consider them legitimate, efficient, modern, or otherwise appropriate (see March and Olsen, 1989; Steinmo and Thelen, 1992; and Pierson, 2004)?

Moving beyond rational choice analysis, more sociological approaches that admit normative and ideational explanations are, arguably, particularly well suited to understanding the role that communities of expertise might play in (trans)forming the institutions that they populate, and, in particular, why they might seek to inculcate them with their distinct vision of how governance ought to be (Adler and Haas, 1992, p. 375). Communities of expertise unite around shared normative commitments that can be expected to inform institutional (trans)formations in a significant way if these communities enjoy the influence that is hypothesized in this chapter. While they are unlikely to act overtly against their own interests, their primary motivation for perpetuating or reconfiguring the transnational networks that they populate may not be to grow their power per se but rather an ideational commitment to doing things in a certain way. A community of expertise is unlikely to promote and comply with particular norms and ideas merely because they serve as instrumental means to its own ends, but more importantly because they embody particular values, roles, and rules that its members consider ‘appropriate’ (March and Olsen, 1998). What a community of expertise deems appropriate depends on how it constructs its members’ notions of duty, obligation, responsibility, principled belief, and identity. These are powerful motivations that members internalize as scripts to which they *ought* to conform and that drive their behavior just as surely as self-interest. The second hypothesis put forward in this chapter – that “new” governance is rendered path-dependent due to the potential for endogenous change – flows from these sociological notions of what motivates communities of expertise in bringing their soft power to bear upon both policymaking *and* institutional processes. It is proposed that transnational networks take on the organizational forms of communities of expertise, not just because they are formed out of such communities but also because those communities seek,

wherever there is an opening, to transpose their internal governance practices onto the institutions they populate. They are not only actors within but also advocates for a particular institutional form, being normatively committed to a soft (nonhierarchical) form of disciplining and a transnationally networked way of doing things, which they consider to be a governance model of wider applicability. In other words, they believe systematic peer review against internally agreed validity criteria is a universally relevant method for testing knowledge claims, including those made in a policymaking context.

## Conclusion

The account hypothesized in this chapter moves beyond the assumption that soft-law, transnationally networked coordination – “new” governance as a mode of integration in Europe – emerges and evolves as a result of calculations by the Member States (Moravcsik, 1993), with greater or lesser input from the EU institutions. Instead, it interrogates an important additional perspective, namely, the extent to which transnational networks and their communities of expertise, which the Member States and/or EU institutions put in place to help them, are actually growing themselves and have therefore become a prominent driver of the pace and particularly the form in which European integration now appears to be developing. In other words, intergovernmental design (the need to generate governance capacity beyond the state while taking into account increased public sensitivity to losses in national sovereignty) and supranational entrepreneurialism (especially the Commission’s autonomy and ambition to expand its own power) create conditions conducive to soft-law, transnationally networked coordination. But do they necessarily exhaust its decisive causes?

In this chapter, we have sketched out an endogenous explanation for the emergence and evolution of Europe’s “new” governance trend, offering (some) theoretical groundwork that might then be tested more robustly through further empirical work. Across a fast-moving field – as EU integration comes to rely increasingly on soft-law, transnationally networked governance in fields as diverse as the regulation of the networked industries, environmental protection, medicines, transport safety, pensions, migration, organized crime, financial markets, and drug control – we should expect the potential for endogeneity to be hugely variable, and further empirical work will need to make apparent its diverse trajectories and implications. That all said, no single explanation for institutional (trans)formations in the EU is likely to hold

universally. The aim should be to combine the explanatory power of different theories by recognizing the assumptions on which each is based and explicitly determining the scope conditions under which we can expect each to have most 'explanatory traction' (Héritier, 2007, pp. 39, 67, 228). The hypothesis put forward in this chapter should be taken in this spirit: it supplements and complements (but does not replace) existing intergovernmental or neofunctionalist theories of European integration. It emphasizes the distinct role played by communities of expertise that are endogenous to soft-law, transnationally networked governance in Europe whom these more orthodox theories, by design, are less likely to draw within their analytical focus, and suggests these communities' particular relevance to the (trans)formation of these "new" modes of governance.

# 15

## Regio-crats' Policy Participation Demands in the EU Multilevel System

*Michael W. Bauer and Philipp Studinger*

### Introduction

Over the past 50 years, regions – and especially those in today's European Union – have been entrusted with ever greater political authority (Hooghe *et al.*, 2010). However, we know very little about the elites who run these subnational political structures, who shape regional political decisions and implement political programs. This chapter focuses on the policy preferences of top-level regional civil servants ("regio-crats"). How do regio-crats want to see policy competences allocated in the emerging multilevel system?

### Competing explanations: what explains regio-crats' competence allocation preferences?

Analyzing regio-crats' preferences, the question is: what might determine differential policy allocation demands? In other words, what are the factors, with respect to a range of predefined policy areas, that lead regio-crats to desire policy codetermination rights in the multilevel system? We suggest three explanatory programs: the individual opportunity approach, the functionality approach, and the social identity approach.

### The individual opportunity approach

The first explanatory program is strongly related to utility calculus. It argues that individuals calculate the respective impacts of different options on their personal opportunity structures. As a consequence, when faced with a choice, individuals will favor the option they believe will lead to a higher personal payoff. Other studies have shown that



individual opportunity structures – especially in the case of bureaucrats – are driving forces behind preference formation. Regarding the question of regional authorities' policy competences, we argue that top-level subnational bureaucrats will desire the allocation of competences to the regional level if they expect some gain for themselves.

### **The functionality approach**

The second explanatory program concerns the nature of policies themselves. Recent studies find that functionality is an influential factor when the allocation of competences is examined (Schakel, 2009). The issue of functionally efficient policy allocation is debated in the literature on fiscal federalism. Oates' theorem states that, in the absence of problems of redistribution and negative external effects, policies should be allocated at the lowest possible hierarchy level (Oates, 1999, p. 1122). In addition, although economies of scale might push the provision of most public goods and services toward the national (or even higher) political levels, possible heterogeneity of local preferences, which would pull allocation of competences to subnational levels, also have to be considered. Especially because detailed information about local diversity (which would be needed to design efficient policy solutions) is difficult to obtain and to process centrally, efficient (that is, functional) allocation of competences is usually not quite as central as the functionality paradigm predicts at first sight. Concerning regio-crats, we can assume that they come with special knowledge about these characteristics of the different policies. In consequence, it is plausible to argue that they are able to roughly rate the efficiency of different options regarding policy competence allocation. In sum, if top-level subnational bureaucrats base their preferences regarding policy competences for regions on a rationale of functionality, then they should favor policy competences for subnational entities only if regulation at this level of authority is functionally efficient.

### **Subnational social identity approach**

The explanatory program we call the subnational social identity approach sees the affiliation of individuals to socially defined groups as an important factor in the formation of preferences. Individuals form and orient their preferences in line with the norms and values of their own social groups. It is clear that subnational administrators are part of the socially defined group of the region to which they belong and for which they work. Since they hold top-level positions within their regional administrations, they prepare, design, and implement policies and political

Table 15.1 Explanatory approaches and respective hypotheses

Explanatory approach	Hypothesis	Dependent variable
Individual opportunity	Regio-crats should desire more regional policy competences if they expect a positive impact on their individual situation	Regio-crats' preferences regarding regional policy competences
Functional criteria	Regio-crats should favor policy competences for the regions if regulation at this level of authority is functionally efficient	
Subnational social identity	Regio-crats should desire more regional policy competences if they belong to a region with a high emancipatory potential	

Source: Own compilation.

decisions and consequently are familiar with the political interests of their region. In consequence, it is plausible to assume that the interests and preferences of regions' institutions are a primary focus of the regional administrators (Table 15.1).

### **Other alternative influences: socioeconomic context, cultural distinctiveness, and politico-institutional setting**

One important factor discussed in the subnational mobilization literature is the socioeconomic situation of regions. However, there is disagreement about the actual direction of this relationship. On the one hand, socioeconomically strong regions want to gain some independence from central government and assume competence for certain policies (Gourevitch, 1979). On the other hand, socioeconomically weak regions are also believed to have an incentive to take matters into their own hands with a view to advancing their economic development independently of the nation state (Hechter, 1975). Whatever the explanation behind regional "emancipation" desires, they are evidence for the emerging of the multilevel state as has been outlined in the introduction of this book.

Another factor that influences the emancipatory potential of a region is its cultural distinctiveness. Subnational authorities that deviate from the national population with respect to ethnic or religious characteristics are culturally distinct from the nation state. This regional

identity induces the desire to safeguard self-determination. Therefore, subnational entities that are culturally distinct from the nation state should be interested in holding competence with respect to many policies.

Third, party-political competition is believed to influence subnational demands for autonomy (van Houten, 2003, 2009). In particular, incongruence in the composition of the governmental coalition between the regional and national levels might produce disagreement in policy-making and consequently stimulate the desire for policy competences among regional elites.

Finally, the institutional setting of subnational authorities – also discussed in the mobilization literature – also has to be taken into account. On the one hand, regions that are already institutionally well endowed are argued to be more active promoters of policies. The less restricted subnational authorities are with respect to their policy engagement, the greater their (potential) scope for development. On the other hand, the status quo of regional competences should be a good predictor of desire for competence allocation because the current setting to some extent determines the possibility of increased allocation. In other words, the degree of constitutionally defined regional autonomy should be correlated with the amount of policy competence desired by regio-crats. We attempt, where possible, to include these factors in our analysis.

## **Research design**

In order to test for the territorial effect on regio-crats' preferences regarding policy allocation, we make use of a survey addressed to subnational administrative elites concerning their attitudes about different aspects of European integration and governance. We defined the subnational units we are interested in as political authorities that are located directly below the national level and have an elected assembly. The selection of interviewees – high-ranking officials in subnational administrations – was carried out in several stages.<sup>1</sup> Eventually we conducted about 350 interviews in over 60 European subnational administrations (Table 15.2; for further details see Table A15.1).

Our dependent variable is these regio-crats' preferences regarding the participation of the subnational level in 12 policy areas in the European multilevel system. We thus asked top-level subnational bureaucrats to decide whether or not regional authorities should be involved in policymaking across a range of 12 specific policy areas.<sup>2</sup> We constructed an

Table 15.2 Sample structure

Country	Regions included in sample	Interviews per region	Interviews per country	Response rate (per cent)
Germany	13 Länder (of 16)	4–9	78	47
Poland	12 Voivodeships (of 16)	2–9	70	45
Hungary	19 Megyek (of 19)	2–7	84	41
France	10 Régions (of 26)	1–13	66	45
Spain	6 Autonomous Communities (of 17)	5–11	49	53
<i>n</i> = 347				

Source: Own compilation.

additive index ranging from 0 (no regional competence) to 12 (competence regarding all policies under study). An even more detailed analysis is possible if we distinguish between policies that are regulated in a functionally efficient manner at the regional level and those that are not. However, we need an objective benchmark in order to evaluate whether or not a particular policy is regulated efficiently at the subnational level. Such a benchmark unfortunately does not (yet) exist. We adopt a second-best solution for our problem by following fiscal federalism arguments and then deducing implications for the subnational level. In essence, we assess whether the scope and externalities of policies are decisive parameters for ascertaining whether a certain policy can be regulated efficiently at the regional level or not. We thus derive a yardstick that is explained in more detail in the Appendix. Based on this distinction, we can derive two other variations of the dependent variable. One concerns the preference for competence allocation at the regional level in regard to policies that are efficiently regulated by subnational authorities, while the other concerns those that are not.

The operationalization of the opportunity approach is based on individual-level variables that were also collected by means of the survey. On the one hand, the dummy variable “career ambitions” indicates whether top-level bureaucrats want to advance their career within the regional administration where they work. The dummy variable “security of employment” (as a motivation for entering the subnational administration) taps into another common aspect of individual utility.

The subnational social identity program is based on factors that are common in subnational mobilization research. The variable “regional GDP” (Gross Domestic Product) describes the socioeconomic situation of the regions. The dummy variable “stateless nation” indicates cultural

differences between the nation state and the subnational entities. The party-political situation is captured by the opposition variables: if the subnational governmental coalition is partly in opposition at the national level, the variable "partly in opposition" is coded 1 (otherwise 0). If no regional government party is represented in the national government, the variable "completely in opposition" takes the value 1. Finally, the institutional embeddedness of the subnational authorities is operationalized by an indicator taken from the regional authority index developed by Hooghe *et al.* (2010). The variable "institutional depth" measures the extent to which a regional government is autonomous as opposed to deconcentrated.

Finally, we include a control variable allocated at the subnational measurement level. The variable "regional population (log)" captures how populous a subnational entity is. In the literature, it is assumed that efficient provision of public goods is determined not only by the characteristics of the policies themselves but also by the size of the affected group. We argue that, all else being equal, the larger the regional population, the more efficient (or less inefficient) is the regulation of the policy at the subnational level. Because regions differ in regard to their number of inhabitants, we control for this fact (Table 15.3; for further details see Table A15.2).

## Empirical analyses

Asked whether the subnational level should hold competence regarding 12 policy areas, the average response of regio-crats was in the midrange, although there was a high standard deviation (see Table 15.4). In general, the regio-crats we surveyed turned out to be surprisingly reluctant to see regions participating in the multilevel governance system. A comparison of the national mean values for competence allocation at the regional level reveals variation in the preferences for subnational participation within our sample. First, we observe differences across countries. Hungarian top-level subnational bureaucrats do not see a need for extensive policy participation. On average, they desire competence regarding only 1.6 of the 12 policy areas. Although the desire for policy competence is stronger in the other countries, German respondents are still surprisingly modest in their preferences, desiring subnational competence for only 3.4 policies. This picture is noteworthy because the preferences actually lag behind the status quo for German *Länder* competences. The national mean values for the Polish (4.8) and French (4.3) respondents point to a mid-degree claim for codetermination rights

Table 15.3 Operationalization of the explanatory variables

Explanatory approach	Variable	Operationalization	Expected sign
Individual opportunity	Career ambitions	Interviewee wants to advance his or her career within the subnational administration <sup>3</sup>	+
	Security of employment	Interviewee is motivated by the security of employment within the subnational administration <sup>4</sup>	+
	Functionality	Number of individual competence preferences that match with allocation as functionally efficient for the 12 policies under study	+
Subnational social identity	Regional GDP	Gross Domestic Product	-/+
	Stateless nation	The region is a stateless nation	+
	Partly in opposition	Regional governmental coalition is partly congruent with the national governmental coalition	+
	Completely in opposition	Regional governmental coalition is in opposition at national level	+
	Institutional depth	Extent to which a subnational government is autonomous rather than deconcentrated	+
Control	Regional population (log)	The logarithm of the regional population	+

Source: Own compilation.

compared with the other country scores. In contrast, Spanish top-level subnational bureaucrats favor regional participation in about eight policy areas, which reflects a desire for strong policy participation within the European multilevel system. Second, the standard deviations for the countries listed in Table 15.4 indicate considerable within-country variation as well. In other words, we do find interesting variation within the five countries. What explains such differences among regio-crats' preferences for policy codetermination rights?

Table 15.4 National mean values for desired policy competence

Country	Mean	SD	N
Germany	3.4	2.3	76
Poland	4.8	2.5	65
Hungary	1.6	1.8	83
France	4.3	2.0	65
Spain	8.0	1.3	49
Total	4.1	2.8	338

*Note:* The table shows the mean value of the desired number of policies for regional policy competences. Shown are the mean values (mean) of the preferences, the standard deviation (SD), and the number of respondents (N) for the sample and per country.

*Source:* Own compilation.

Can the differential desires for policy codetermination be explained by functionality? Looking at the preference patterns of the top-level subnational bureaucrats in regard to the 12 policy areas, we are able to assess whether the administrators form their preferences on the basis of a functionality rationale or not. By comparing the preference patterns for regional policy competences with what we deem would be the objective functional policy allocation, we are able to assess whether or not there is a correlation. If the interviewees favored regional policy participation regardless of whether or not such codetermination is functional (according to our assessment), we have at least an indication that something other than a functional-efficiency explanation must be at work.

Having carried out the categorization, we can count for how many policies the answers of our regio-crats are in line with the presumably most efficient allocation. Our result is that the answers of our respondents are substantially in line with functional criteria of competence allocation. Table 15.5 gives an overview of the share of policies for which the regio-crats' preferences for regional participation (or non-participation) are in accordance with the allocation on the basis of functional efficiency. For example, the preferences of about 59 per cent of the German interviewees are in line with the functionality rationale for six to eight policies. In France, about 57 per cent of our respondents show preferences that correspond with the efficient participation or nonparticipation of regional authorities for more than eight policies. All in all, in every country we studied, the preferences regarding (non-)

Table 15.5 Correspondence of regio-crats' preferences with functional needs

	Germany	Poland	Hungary	France	Spain	Total
For how many of the 12 policies do subnational administrators' responses correspond with efficient competence allocation?						
For less than 6 policies	7.9	9.2	41.0	4.6	12.2	16.3
For 6–8 policies	59.2	41.5	50.6	38.5	83.7	53.3
For more than 8 policies	32.9	49.2	8.4	56.9	4.1	30.4

Source: Own compilation.

participation of subnational authorities of the majority of interviewees correspond with the functional-efficiency expectation. Only a few respondents demonstrate codetermination preferences that clearly conflict with functionality.

Summing up, we observe that the national mean preferences for regional participation in the 12 policies differ across the 5 countries, with the Spanish having the highest and the Hungarian the lowest scores. At the same time, however, we observe variation within the countries under study. The individuals' preferences concerning the desired extent of regional policy competence vary considerably within the countries. Individual attitudes deviate most around the respective national average in Poland and Germany. To find a reason for this result, we turn to the statistical analysis.

### Quantitative analysis

Our quantitative analysis assesses how the factors underlying the explanatory approaches are related to the dependent variable, namely, the desire for regional codetermination in different policy areas. We basically run three regressions, which differ in the conceptualization of the dependent variable. The dependent variable of the first model refers to all 12 policies under study. In the second and third models, the dependent variables relate to policies for which (according to our yardstick) regions constitute the functionally appropriate – or nonappropriate – governmental level of execution for the policies in our sample. This procedure enables us to detect stable relationships between the independent variables and the subnational administrators' preferences regarding regional policy codetermination. Moreover, we gain knowledge about the influence of policy-inherent logics on the process of preference formation. The results of the models are presented in Table 15.6.



First, the subnational administrators' preferences regarding regional competence are analyzed with respect to all 12 policies (Model 1 in Table 15.6). Concerning the individual utility variables, only the indicator for safety thinking ("security of employment") is significant. The positive sign is in line with the theoretically expected relationship: administrators who entered subnational administrations motivated by security of employment are in favor of more subnational competences. As regards the social identity approach, the socioeconomic variable reflecting the regions' economic performance (measured in GDP) shows a negative sign – implying that the desire for subnational competence decreases with regional wealth. In other words, our data show that regio-crats from socioeconomically weaker regions are more in favor of regional policy participation than their colleagues from socioeconomically stronger entities.

Cultural distinctiveness is also influential as a predictor of regional desire for emancipation from the nation state. The positive and significant coefficient of the variable "stateless nation" indicates that subnational administrators of such regions in our sample (Alsace and Brittany in France, Catalonia and País Vasco in Spain) want to have more subnational policy competences. We also find significant coefficients concerning the indicators of the party-political constellation. On the one hand, the subnational context in which the regional government is "partly in opposition" to the national government or government coalition seems to be negatively related to the desire of the top-level bureaucrats for regional policy competences. In contrast, the individuals from subnational authorities where the regional government is "completely in opposition" to the national government (or governmental coalition) are obviously more in favor of policy participation by their authority. We supposed that the institutional setting would influence the preferences as well. The significant and positive coefficient of the variable "institutional depth" is in line with the theoretical expectation that top-level bureaucrats from institutionally strong regions would desire more codetermination rights over a greater range of policy areas. What also shows a significant and positive coefficient, however, is the variable measuring regional population. This means that the larger the regional population, the more competences are desired by regio-crats. The model including all 12 policies shows a considerably higher degree of variance between the groups (regions) than within the regions. Overall, Model 1 explains about 24 per cent of the variance.

Second, we analyzed only those policies that can be deemed efficiently regulated at the subnational level (Model 2 in Table 15.6).<sup>5</sup>

Table 15.6 Regression results for all 12 policies

Explanatory approach	Variables	Model 1: all 12 policies	Model 2: 7 functional policies	Model 3: 5 nonfunctional policies
Opportunity approach	Career ambitions	0.043 (0.279)	0.041 (0.223)	0.002 (0.090)
	Security of employment	0.969* (0.518)	0.381 (0.413)	0.386** (0.168)
Subnational social identity	Regional GDP	-0.125** (0.053)	-0.069* (0.037)	-0.058** (0.024)
	Stateless nation	2.728*** (0.833)	1.548*** (0.587)	1.229*** (0.373)
	Partly in opposition	-1.427*** (0.449)	-1.275*** (0.313)	-0.112 (0.204)
	Completely in opposition	1.410* (0.773)	0.807 (0.537)	0.646* (0.352)
	Institutional depth	1.521** (0.678)	0.298 (0.473)	1.244*** (0.308)
Control	Regional population (log)	0.000** (0.000)	0.000*** (0.000)	0.000 (0.000)
	Constant	2.086* (1.255)	3.568*** (0.877)	-1.521*** (0.567)
	Observations	297	297	296
	Number of regions	57	57	57
	r-Squared			
	Within	0.000	0.000	0.003
	Between	0.446	0.446	0.362
	Overall	0.243	0.182	0.315

Note: Standard errors in parentheses; (\*\*\*)  $p < 0.01$ , (\*\*)  $p < 0.05$ , and (\*)  $p < 0.1$ .

Source: Own compilation.

Whereas the individual variables of the opportunity model seem not to be influential at all, the social identity variables show similar patterns to the first model. The “regional GDP” variable is once again negative and significant. Similarly, the “stateless nation” variable is significant

and has a positive sign, as in the preceding model. With respect to the party-political situation, only the variable "partly in opposition" maintains its negative and significant coefficient in this model. In contrast, the variable "completely in opposition" is insignificant in Model 2. The same is true for the regional authority variable "institutional depth." Neither "fiscal autonomy" nor "regional representation" shows a significant coefficient. Finally, the regional population size repeatedly demonstrates a positive and significant coefficient. Comparing the variance explained by this model with the first model, we do not find any enhancement, neither in the explanation of the individual-level variance nor in the explanation of the between variance. However, the overall explained variance of the model on those policies that are efficiently regulated at the regional level is lower than in the model including all 12 policies (Model 1).

Finally, we assess the explanatory programs with respect to those policies in our sample that are supposedly not efficiently regulated at the regional level (see Model 3 in Table 15.6).<sup>6</sup> This variant of the dependent variable might be an interesting case for both the opportunity and the subnational identity approaches. Do such variables influence the preference for regional policy competence, although such participation is not efficient? In this third model, the individual variable of the opportunity explanatory program "career ambition" again shows no significant and positive coefficient. In contrast, the variable "security of employment" regains its theoretically expected positive sign.

The subnational identity approach variables perform comparably to the second model. The "regional GDP" variable shows a negative and significant coefficient. The better the socioeconomic situation concerning GDP, the less policy competences are desired by regio-crats. The variable indicating that a region represents a stateless nation is positive and significant, as expected. The same holds for the political variable "completely in opposition," which reflects the situation where the regional governmental coalition is incongruent with the party-political constellation in national government. Again, we see our expectation of a positive relationship between this variable and the desire for more regional competences confirmed. The variable "partly in opposition," however, is not significant. Concerning the aspect of regional autonomy, we find that subnational administrators from regions that are institutionally well endowed favor more policy competences.

The variance between the units explained by the regression model is lower than in the other two models. Model 3 explains about 36 per cent of the variance between the regions. Compared with Models 1 and 2,

this proportion is lower. In contrast, with regard to the overall variance, we find a high proportion is explained by Model 3 (about 32 per cent).

Discussing the regression results in the context of nonfunctional policies, we believe this is evidence that subnational administrators' preference formation is based on an opportunity rationale. Personal interest in secure employment in the regional administration is influential not only in the first model, comprising all 12 policies, but also in the third model, which concentrates on those policies that are not efficiently regulated at the regional level. As regards the emancipatory ambitions of regional authorities, which are supposed to be the driving force in the social identity approach, we find some evidence to confirm the theoretical reasoning. Whereas the picture is clear for those administrators from culturally distinct regions who favor more policy competences, the influence of the political situation is less evident. In contrast, we find unambiguous results for the influence of the institutional setting ("institutional depth") on the extent of regional policy participation.

Summing up, the results of our quantitative analysis are consistent. The significant variables do not change their signs in the different models and we find the theoretical expectations generally confirmed. However, some points have to be reinvestigated in more detail. This applies, in particular, to the influence of the party-political constellation of the regions compared with the situation at the central state level. On the one hand, we find the expected relationship for the case when the regional government is not congruent with the party-political constellation of the central government. On the other hand, the opposite is true for the case where the regional government is partly in opposition at the national level. This contradicts the theoretical expectation and requires further investigation.

## Conclusion

The modern state and its public administration are transforming. Multilevel structures of public administration including national, European, and international levels of decision making have become institutional characteristics of modern governance as Bohne *et al.* outline in the introduction chapter of this volume. Regional participation demands in the multilevel state are however dispersed and patchy and vary in intensity. It is this heterogeneity that poses a great challenge to more classical concepts of the state and how its administration should be organized and work. Two sets of conclusions can be drawn from our empirical study in this context. The first concerns the question as to

how to explain regio-crats' preferences regarding policy participation in the emerging multilevel state. Notwithstanding bold statements in the relevant literature, the bureaucratic desire for subnational policy code-termination is astonishingly low throughout our sample. Regio-crats cannot be seen as "competence conquerors" that fuel state transformation by demanding ever greater policy involvement of their "regions." Quite the contrary, regio-crats appear in this respect to be rather conservative, sometimes even astonishingly "state-centric." There is little reason to fear (or hope, depending on the perspective) that regio-crats will try to shake up the existing competence distribution in favor of "their" subnational level. In brief, the often articulated suspicion that regions will actively ask for ever greater policy involvement cannot be substantiated by our data. Instead, the preferences seem to a large extent based on a rationale of functionality. Our data suggest that regio-crats' policy participation demands are in harmony with what can be conceived as objectively efficient vertical competence allocation. On a smaller scale, the statistical analyses show that besides individual utility aspects, variables that are related to regional emancipatory ambitions also have a positive influence on the desire for more policy competence. Cultural and political distinctiveness (in comparison to the situation at the central state level) increases the demand for regional policy involvement. In other words, a large-scale and uniform movement in the direction of a "Europe of the regions" is unlikely. Pressure for greater regional policy involvement is differential, and its direction and magnitude depend on particular regional situations. On the basis of our analysis, we do not expect demands for regional policy involvement to be systemic and systematic, but disorderly, disparate, and diverse. Regional policy participation demands in the multilevel system are pragmatic, patchworked, and incremental – and more conservative than transformative.

## Appendix to Chapter 15

See Tables A15.1–A15.3.

*Table A15.1* Overview of regions represented in the sample

Country	Region	Number of interviewees	Country	Region	Number of interviewees
<b>Poland</b>	Dolnośląskie	7	<b>France</b>	Alpes Côte	7
	Kujawsko-Pomorskie	9		Alsace	4
	Lubelskie	7		Aquitaine	1
	Lubuskie	6		Bretagne	6
	Małopolskie	5		Centre	13
	Mazowieckie	4		Franche-Comté	4
	Opolskie	8		Île-de-France	8
	Podkarpackie	4		Midi-Pyrénées	10
	Pomorskie	6		Poitou-Charentes	6
	Śląskie	2		Rhône-Alpes	7
	Świętokrzyskie	5			
	Wielkopolskie	7			
<b>Hungary</b>	Bács-Kiskun	5	<b>Germany</b>	Baden-Württemberg	8
	Baranya	3		Bayern	8
	Békés	3		Berlin	4
	Borsod-Abaúj-Zemplén	7		Brandenburg	5
	Csongrád	4		Hessen	5
	Fejér	4		Niedersachsen	5
	Győr-Moson-Sopron	6		Nordrhein-Westfalen	9
	Hajdú-Bihar	4		Rheinland-Pfalz	7
	Heves	7		Saarland	5
	Jász-Nagykun-Szolnok	3		Sachsen	6
	Komárom-Esztergom	6			
	Nógrád	3	<b>Spain</b>	Sachsen-Anhalt	7
	Pest	7		Schleswig-Holstein	4
	Somogy	6		Thüringen	5
	Szabolcs-Szatmár-Bereg	3		Andalucía	11
	Tolna	3		Baleares	9
	Vas	5		Cataluña	6
	Veszprém	3		Galicía	8
	Zala	2		Madrid	10
				País Vasco	5

Table A15.2 Independent variables

Variable	Level of measurement	Operationalization	Coding	Expected sign
Career ambitions	Individual	Interviewee wants to advance his or her career within the subnational administration	1 = yes, 0 = no	+
Security of employment	Individual	Interviewee is motivated by the security of employment within the subnational administration	1 = yes, 0 = no	+
Regional GDP	Subnational	Gross Domestic Product	Gross Domestic Product (purchasing power parity) per capita in €1,000	-/+
Stateless nation	Subnational	The region is a stateless nation	1 = yes, 0 = no	+
Partly in opposition	Subnational	Regional governmental coalition is partly congruent with the national governmental coalition	1 = yes, 0 = no	+
Completely in opposition	Subnational	Regional governmental coalition is in opposition at the national level	1 = yes, 0 = no	+
Institutional depth	Subnational	Extent to which a subnational government is autonomous rather than deconcentrated	0 = no functioning general-purpose administration at the regional level; 1 = deconcentrated, general-purpose administration; 2 = non-deconcentrated, general-purpose administration subject to central government veto; 3 = non-deconcentrated, general-purpose administration not subject to central government veto	+
Regional population (log)	Subnational	Regional population as percentage of the national population	log (percentage)	+

Table A15.3 Classification of policies

Policy	Is a regional participation in this policy functional?	Rationale
Social affairs	Yes	The standard of regulation of social affairs is already high within the EU Member States, so that there is no call for central regulation. Furthermore, some studies argue that differing levels of regulation might lead to a competitive advantage for a region in some sociopolitical areas (and that heterogeneous preferences regarding regional regulation can be traced back to this). At any rate, the involvement of the regions is consistent with the functional principles of competence allocation
Asylum and immigration	No	The area of asylum and immigration is characterized by high external effects. To internalize these and to avoid free rider effects, regulation ought to be conducted as centrally as possible (that is, at national or supranational level)
Foreign affairs and defense	No	This policy area is characterized by high external effects. Moreover, regulation preferences are relatively homogeneous (at least within the EU Member States). By centralizing (regulation at EU level), external effects can be more fairly distributed in the community, free rider effects can be avoided, and national obstacles overcome. Other authors claim that foreign and defense policies should be regulated at the national level because resulting costs and benefits also manifest at the national level. According to this view, regional participation in foreign affairs and defense is not functional
Health and consumer protection	Yes	Health care and consumer protection need to be adjusted to the citizens' requirements on site, while, at the same time, standards should be uniform and binding EU wide. The most efficient approach is for health care and consumer protection to be regulated under involvement of all levels of the hierarchy (EU, nation state, and subnational entities). Thus, the regions should be involved in shaping this policy
Border police and frontier defense	No	This policy also entails high externalities, which – from a functional perspective – need to be reallocated to the community. From a European point of view, the observance of uniform standards and the export provisions of the Schengen Agreement must be kept in mind



Culture and education	Yes	The policy area of culture and education has a strong identity-defining component. Thus, heterogeneous regulation preferences potentially outweigh external effects. Resulting benefits of centralization are estimated as limited. Hence, and in line with functional considerations, a decentralized provision of services is to be preferred here
Agriculture	No	In the EU context and under efficiency considerations, regulation at the community level is not justifiable. However, excessive decentralization would counteract the Single Market. Hence, from a functional perspective, this policy can be best organized at the national level
Tourism	Yes	Regional preferences and requirements vary within this policy. In addition, for many regions, tourism holds an identity-defining component. Accordingly, the regions should be involved in shaping this policy
Environment	Yes	Due to the strong external effects of environmental problems and their transnational scope, a stipulation of regulation standards on the supranational level would fit best. However, specific environmental problems are regionally concentrated, so that an involvement of national and subnational entities in environmental politics is assumed to be functionally adequate
Monetary policy	No	Monetary policy (at least in the EU) is among those policies that, for reasons of economic efficiency, should be regulated centrally. Even if states are not members of the European Monetary Union (Euro), a central regulation seems to be appropriate to guarantee uniform standards of quality
Economic development and structural policy	Yes	In the area of economic development and structural policy, it is assumed to be economically wise to regulate basic aspects and conditions at the central level (EU) to avoid distortions of competition. However, subnational actors should be involved during policy implementation so as to ensure an efficient realization on-site that corresponds to regional requirements
Research and technology	Yes	Differing regional standards of regulation in the area of research and technology boost regional competition and are seen as regional economic factors. Accordingly, a decentralized regulation is to be preferred from a functional perspective. However, it is also argued that some research areas, for example, nuclear energy, require a central political organization

## Notes

1. For details about the sample, how it was constructed, and also more references to the pertinent literature, see Pitschel (2012) as well as <http://www.uni-speyer.de/Bauer/Forschung.htm>.
2. The 12 policy areas are social affairs, asylum and immigration, foreign affairs and defence, health care and consumer protection, border police and frontier defence, culture and education, agriculture, tourism, environmental protection, monetary policy, economic development and structural policy, and research and technology. Note that we do not differentiate between administrative and legislative competences.
3. The variable is based on a survey question: "Which professional position would you like to have reached in 5–10 years? That is, other or same position in the regional administration, in a national ministry, in the EU administration?" Whenever the interviewee indicated that he or she sought to reach a higher position in the administration, the variable "career ambitions" is coded "1," otherwise "0."
4. The information is based on a survey question: "Why have you chosen to work in the administration of a region? Please tell me the most important reason." The answer options were secure job, proximity to residence, good salary, good career prospects, interesting working area, would like to contribute to the development of the region, I was offered this job, or decentralization or fusion. For interviewees who indicated the option "secure job," the variable "security of employment" is coded "1," otherwise "0."
5. These policies are social affairs, health care and consumer protection, culture and education, tourism, environmental protection, research and technology, and economic development and structural policy. The reasons for this classification are explained in Table A15.3.
6. These policies are asylum and immigration, foreign affairs and defence, border police and frontier defence, agriculture, and monetary policy. The reasons for this classification are explained in Table A15.3.

# Concluding Observations

## The State Is Here to Stay: We Cannot Live with It, We Cannot Live without It

*Eberhard Bohne, John Graham, and Jos C. N. Raadschelders*

The central question we have tried to address in this volume is how developments within and around the state influence its normative foundations, functions, structures, and processes. In the Introduction, we introduced four conceptions of state as a framework for the various chapters: protecting state, participatory state, transparent state, and multilevel state. In this concluding chapter, we bring these together and suggest some overall trends relevant to the future of public administration and the state.

The question of the role and position of the state in contemporary societies can be assessed on the basis of specific trends that, in turn, contribute and amount to some intriguing major transformations. However, as we suggested in the Introduction, it is not sufficient to evaluate the state's role and position today without a historical perspective.

With regard to the protecting state perspective, we observe that for most of history this role was understood as protection against domestic and foreign threats. From their earliest times to the present, governments have developed functions in policing, justice, and defense, financed by some system of taxation. Until approximately 200+ years ago, the state was an institution solely controlled by small power elites. The larger population was treated as subjects only, from whom resources in kind, labor, and/or money could be extracted. In what is elsewhere described as a great watershed in the development of state and government, the decades between 1780 and 1820 (Raadschelders, 2014) saw changes that included the – in the juridical lens – separation of politics and administration, constitutionalism, separation of office and office-holder, and separation of church and state, all of which resulted in the emergence of increasingly inclusive economic and political systems (as Acemoglu and Robinson, 2012, described it).

In retrospect, the first sign that the state developed participatory mechanisms was the expansion of the franchise, first for males, and then for females. This happened during the decades that the state slowly but surely expanded its services and policies beyond the traditional law and order functions. The moves of the state into health care, education, housing, utilities (gas, electricity), and water supply – and these are just a few examples – around the 1900s, and – later – into energy and environmental conservation, expanded its protective functions. It is in the period between 1880 and 1920 that the basis was laid for what became, after World War II, the welfare state. While the expansion of the franchise turned subjects into citizens, and thus provided some degree of participatory opportunities to the people, we also know that with the growing size of the state (as can be measured in terms of personnel size, revenue and expenditure, primary and secondary legislation, and organizational differentiation), quite a variety of tasks were transferred from “citizen functionaries” to the rank and file civil service. One of the most common occurrences was the creation of – usually municipal – police forces and the abolition of the night-watch, a conscripted duty for the adult male population in most Western countries during early modern times. We know that at least in one country, legislation was passed by Parliament in the mid-1960s that replaced citizen functionaries by full-time career civil servants for the provision of a variety of local functions, and so the number of citizen functionaries declined significantly (Raadschelders, 1994).

We cannot say whether the same happened elsewhere, but it is intriguing that one of the trends surrounding the state is the growth of volunteerism, especially at the local level. The participatory state is no longer limited to the right to vote, as citizens are actually more actively involved in, or at least given the opportunity to be informed about, the content of policymaking, sometimes enabled by such legislation as the 1946 Administrative Procedure Act in the United States (Kovač/Sever). There is, though, another side to this participatory state: people have rediscovered the power of self-governing capacities. Self-governing mechanisms are documented as having existed throughout history (Ostrom, 1990), but it seems that this recent increase in volunteerism provides important services and, in some cases, an alternative to local government provision of services (Bovaird *et al.*; Brudney/An Woodworth). Indeed, and as reported in this volume, political decentralization – where local governments are “given” tasks and decision-making authority (frequently without adequate financial resources) – correlates strongly with enhanced horizontal coordination (Kuhlmann *et al.*) both between

local (and sometimes regional) government agencies and between these agencies and civic and/or self-governing associations.

The participatory opportunity has been shored up by efforts at making the state more transparent. The open information acts (starting in the 1970s) in many countries heralded the start of a development toward more active information exchanges between public organizations (Peled). The subsequent emergence of digital government and online capacities furthered chances for citizens to inform themselves (Spina; Blomgren Amsler/Foxworthy). Many of the efforts to involve citizens happen at the local level. The regional level has been reported to be rather conservative (Bauer/Studinger). At the national level, that of the state, there is one trend concerning the expanding importance of transnational networks, in other words, the emergence of the multilevel state (Corkin/Boeger).

To what overall trends do these specific developments point? With regard to participation and transparency, one major trend is the emergence of big data, the potential influence of which we have not yet grasped. How will big data inform policymaking? How will policymakers deal with the flood of information becoming available about much of peoples' behaviors and desires? Just googling the term "Big Data" will show that conferences about it started only about two years ago; thus, it is clearly a subject of very recent interest. Will the technological capabilities available today lead to the risk of making decisions too quickly, or will they better inform decision makers in real time? With regard to IT systems, the problem is not so much that the integration of different IT systems is often technologically difficult, but rather that resolution is required of what information state agencies and other organizations are willing and permitted to share with one another.

The potential of increased participation and transparency has major consequences for the protective functions of the state. The trend, starting in the 1980s, toward a more liberalized and deregulated economy is ongoing. In some countries the state still operates as, what Schuppert called, the ensuring state (for example, Germany, the Scandinavian countries), but we see that in other countries the state is moving in the direction of being an enabling state (United Kingdom, the Netherlands). The ensuring state truly embodies what Hubert Humphrey (1977) once said:

The moral test of government is how that government treats those in the dawn of life, the children; those who are in the twilight of life, the elderly; those who are in the shadows of life: the sick, the needy, and the handicapped.

This is a fine characterization of the welfare state as it unfolded in the 1950s and 1960s, only to be slowly weakened – at least in some countries – from the mid-1970s on. Under the guise of empowering citizens, neoliberal<sup>1</sup> political officeholders slowly but surely are withdrawing national involvement in certain functions, devolving them to the state/provincial or local levels, sometimes (or even often?) without adequate financing. The recent decentralization of youth and of elderly care in the Netherlands is clearly a retreat from the welfare or ensuring state. Philanthropic organizations – especially in the United States – have exploded to fill some of the void.

In this volume, three types of state intervention were distinguished: regulation, the protection of private economic activity, and coordination mechanism (Franke). With regard to regulation, a question that is difficult to answer is: when is there too much or too little regulation (Graham; Chakraborty/Creutzfeldt)? With regard to ensuring or welfare state functions, clearly some countries seek to reduce regulation. In other areas, efforts are made to increase regulation, such as in the case of antiterrorism efforts (Lehrke/Schomaker). But nowhere is this overall trend at deregulation as visible as in the state's role in protecting the economy. Where someone such as Alexander Hamilton wanted a financial system wherein banks and markets would support public debt, reality has played out quite differently. In a recent analysis of major economic crises in the past two centuries in the United Kingdom and the United States, *The Economist* (2014) showed how increasingly the state has succumbed to being responsible for the stability of the financial system, and, as a consequence, loading the detrimental consequences (think of the black tulip bubble in the Dutch Republic in 1637, the housing bubble in the United States of 1837 [Roberts, 2012], and the recent 2008 collapse of the housing bubble in the United States) of private risk taking in banking, insurance, and trade unto the taxpayer. The advice *The Economist* writers provided is to put risk back into the private sector by removing the subsidization of banks, which will increase the cost of their debt and where equity holders will lose. But the Great Recession has spurred a plethora of new regulatory programs in both the United States and Europe. It sounds so simple but the state has become, whether we like it or not, the major guardian of the economy, partly through regulatory oversight but also via bailouts in some sectors and countries.

And this is the big conundrum: people's trust in government has declined significantly since the 1970s, and with it their trust in the state's capacity to protect against the hazards of life (whether individual

hazards of sickness, poverty, unemployment, or downswings in the economy). However, when inquired about specific government services, people generally report being quite content and do not wish to cut back these specific services (see Goodsell, 2014). Some of the successes of government are not even apparent, since citizens are unaware of the crises and burdens that are prevented or attenuated. We may blame politicians for being wishy-washy in determining what the state should and should not do, but citizens are quite ambivalent themselves. The state and government in the abstract are too big, but when made concrete they are too small or just about right, depending on the national context. It does appear that we cannot live with the state and its government, given that people perceive it as oppressive. At the same time, we crave the state's help.

Can this paradox be described by this alleged shift from government, which can be regarded as state-controlled policy for society, to governance, where the emphasis is more on the state as a mediating institution amidst many nonprofit actors, private corporation actors, and people in civic and voluntary associations? Is the state really being hollowed out as some have argued (Milward and Provan, 2000)? Surely, the number of privatizations (in some countries more than in others) and the size of contracted-out services seem to indicate that the state is withdrawing some of its primary functions, leaving the implementation of certain policies to nongovernmental actors. However, we cannot but recognize that *the state is the only actor in contemporary society that has the authority to make binding decisions on behalf of the population at large*. In that sense, the state is not hollowed out at all. It is ultimately accountable for the success or failure of outsourcing, and thus it urgently requires performance measurement and management in the same way that purely state-implemented functions require. The dynamics that legitimize policy are present, regardless of the implementing agent. Furthermore, what legitimizes policy is not only that which can be measured as output and (less frequently) as outcomes. Hence, there is the call to more explicitly embed mission-intrinsic policy objectives (in other words, what we wish to achieve with a policy in terms of immediate output and longer-term outcomes) into the policy-extrinsic political system values (Rosenbloom) (which is about the deep-seated values that ultimately legitimize public policy). In relation to this, there is also the call for continued attention to what it means to write that many states can be described as a *Rechtsstaat*: is policy – which is, when all is said and done, a mere response to some environmental event (such as economic development, urbanization, informatization, or a terrorist attack such as

9/11, and so on) – the basis for law, or is law the context within which policy is being developed (Ringeling)?

The state system – that since the middle of the 17th century increasingly is dominated by nation states – has become truly global in two senses. First, most of the territory of our earth is circumscribed by states; only Antarctica is still somewhat common ground and even there the territory of the South Pole is carved up by states making territorial claims. It is hard to conceive of a development away from national states as the basic political jurisdiction, the basic polity structure, in societies. Perhaps only a major natural catastrophe, such as a meteorite impact, could change the makeup of the world's dominant political systems. But such a catastrophe, we expect that the state is here to stay, whether we like it (in the case of concrete examples of quality service delivery) or not (when commenting on the state at a very abstract level as being too big, too bureaucratic, too cumbersome, and so on). Second, the state has become global in the sense that in many cases domestic policy resolution is no longer possible (think of the sex trade, economy and finance, terrorism, pollution, drugs, migration, and so on) without cross-border and transnational collaboration. In short, globalization made states more interdependent than ever. And that, too, supports our conviction that the state is here to stay, at least for the foreseeable future. Without the state, life would be brutish, nasty, and short, as Thomas Hobbes argued. His choice between anarchy (in the classic sense) and absolute government is stark, actually too stark when we consider the extensive evidence of peoples' self-governing capabilities. But self-governing institutional arrangements are mostly, if not exclusively, local in scope and orientation. As we argued earlier, we cannot do without the state unless we find a reasonable alternative.

In the Introduction, we noted that a focus on the concept of state authority (as outlined in Table I.1) neglects the fact that the state and public administration represent an institutional order that emerged through a long historical process. The changing nature of contemporary problems that states have to cope with brings about changes in essential characteristics of the institutional order of state and public administration.

While the protection of citizens from harm has traditionally been a core function of the state (the protecting state), the institutional order has had to adapt to new challenges and risks stemming from a globalized economy and transnational threats (such as terrorism). In that regard, there is a need for national and international institutions that, on the one hand, effectively protect citizens from international



terrorism, and, on the other hand, ensure the protection of individual rights and privacy. A case in point is the dispute over the EU data retention directive (European Union, 2006) that requires providers to routinely retain personal data for six months regardless of security risks, and that was quashed by the European Court of Justice (C-293/12 and C-594/12) on 8 April 2014 for violating EU Law. Another example is the NSA scandal where European governments seem to be virtually helpless.

Considering the demands of citizens for more participation and transparency in government, decision making involves new procedural and structural arrangements in the institutional order of state and public administration (the participatory and transparent state).

With regard to participation, for the past 20 years or so market-based administrative and regulatory reforms have been introduced to public administration. Examples are the New Public Management and the liberalization of energy markets in the EU. These reforms were often accompanied by a great number of regulations to provide market incentives or to ensure market competition, for example, the price cap and revenue cap regulations in the electricity market. Since the implementation of market reforms has often failed to meet expectations, new forms of collaborative management (for example, negotiated settlements, regulated self-regulation, coproduction) seem to be replacing the market model as a source of institutional innovation (Hartley *et al.*, 2013).

In the case of transparency, new information technologies enable governments to conduct pervasive and clandestine operations and controls of citizens. Given the technical complexity of these activities, abuse of power can only be detected with the help of whistle-blowers. There is a need to adapt the international and national order(s) to the new challenges of protecting whistle-blowers. A case in point is the recent legal opinion by a Washington law firm suggesting that German Members of Parliament would commit a crime under US law if they conducted a hearing with Snowden (see Daily Kos, 2014).

Finally, multilevel structures of public administration including national, European, and international levels of decision making have become institutional characteristics of modern governance (the multilevel state). New institutions are needed in the EU to strike a balance between the quest for regionalization and necessary centralization of policies (for example, financial market regulations). At the same time, domestically, policymaking has very much become a multilevel system where national, regional, and local governments, together with non-profit and private sector providers, are interdependent in the delivery of services. An excellent visualization of this has been provided in an

article about the policy field of early childhood education in Minnesota (Sandford, 2010).

Earlier, we attempted to outline the dominant characteristics of the institutional order of the modern state and its public administration at present. What can be the consequences of these trends in state and public administration for the institutional superstructure? Obviously, a definitive answer is not possible since we cannot foresee what environmental developments will happen that fundamentally alter the institutional makeup. However, and from a historical perspective, the contemporary institutional superstructure has been built and strengthened over approximately 200 years. It has been heavily put to the test through economic crises, wars, natural disasters, and man-made atrocities (9/11), but it has not been replaced by a new order. It may sound complacent, but this is about as good as it gets. While we do not believe in notions of being at the pinnacle of civilization, we do think that the present institutional superstructure has proven able to withstand severe challenges by being sufficiently adaptive to external developments. Why that is so ought to be part of the research agenda of public administration scholars. The study of public administration is not and should not be just about the operational level of government activity, the main focus (with some exceptions) in the 20th century, but also about the larger institutional context, that of the state and its global environment within which government operates. We believe that this book provides an acknowledgment of that larger context.

## Note

1. Given that this book is written by authors from Europe, Israel, and the United States, it is important to point out that "liberal" in Europe and Israel refers to being "right of center" in the political spectrum, in other words somewhat or very politically conservative, while in the United States "liberal" refers to being "left of center" in the political arena, and often used as "very left-wing."

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